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JAMES REDFOORD BULWER, Q.C.

VOL. VII.

FROM MICHAELMAS TERM, 1871, TO TRINITY TERM, 1872,
BOTH INCLUSIVE.
XXXV VICTORIA.

LONDON:
Printed for the Incorporated Council of Law Reporting for England and Wales
BY WILLIAM CLOWES AND SONS,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 51, CAREY STREET, LINCOLN'S INN, W.C.
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CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXV VICTORIA.

BUXTON *v.* RUST.

1871
Nov. 1

9 QB 214
7 QBD 127

Sale of Goods—Memorandum in Writing—Statute of Frauds (29 *Car* 2, *c.* 3), *s.* 17.

The plaintiff, on the 11th of January, 1871, bought of the defendant a parcel of wool worth more than 10*l.*, "the whole to be cleared in about twenty-one days." A memorandum of the terms of the bargain was handed by the plaintiff to the defendant. On the 8th of February the defendant wrote: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract." The plaintiff had, in fact, completed his part on the true construction of the contract. On the 9th of February, in answer to the plaintiff's request to see a copy of the contract contained in the memorandum of the 11th of January, defendant wrote in these terms, inclosing a copy: "I beg to enclose copy of your *letter* of the 11th of January:"—

Held, that the letter of the 9th of February, with its inclosure, taken in connection with that of the 8th, constituted an unambiguous recognition of the existence of the contract and of its terms; and that there was therefore a sufficient memorandum in writing signed by the defendant to satisfy the Statute of Frauds, s. 17.

Affd post 279 Ex Ch

THIS was an action for the non-delivery of wool, under a contract between the plaintiff and the defendant. The defendant, amongst other pleas, denied the contract.

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BUXTON v. RUST.

At the trial before Pigott, B., at the Middlesex sittings, in Trinity Term, 1871, the following facts were proved:—

The plaintiff is a dealer in wool in London, and the defendant a farmer and cattle dealer, at Little Leighs, near Braintree. On the 11th of January, 1871, the parties met at Braintree, and entered into a contract for the purchase by the plaintiff from the defendant of some wool. The following memorandum, containing the terms which had been agreed upon, was drawn up and signed by the plaintiff, and handed to the defendant:—

"Bought Mr. G. J. Rust's (the defendant's) wool as examined, at 15*d.* per pound, net cash; greasy and damaged, at 12*d.* per pound, net cash; to be weighed and paid for on the premises, one half; and the whole to be cleared in about twenty-one days. The wool to be delivered at the Chelmsford railway station free of charge, net weight." The wool was worth 150*l.*

On the 7th of February the plaintiff intimated to the defendant that he was coming to Braintree to weigh and pay for the wool, whereupon the defendant, on the 8th of February, wrote him thus: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off as you have not completed your part of the contract. I shall now sell the wool to you again at a different price, or shall sell it to some one else. At the same time I shall be at Braintree to-morrow, Thursday, at eleven o'clock, ready for a fresh deal if you please to come; but do as you please about it. Yours, G. J. Rust." The plaintiff had started to weigh the wool before this letter reached him, and on reaching Braintree the defendant told him verbally he could not have the wool. At the same interview the plaintiff asked for a copy of the contract, and the next day received the following letter from the defendant signed by him:—"9th February. Dear Sir, I beg to enclose copy of your letter of the 11th January, 1871" [here followed a copy of the memorandum of the 11th of January]. The plaintiff subsequently applied to the defendant for delivery of the wool, but the defendant took no notice of the application. This action was then brought.

It was contended that the defendant was not liable, inasmuch

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as there was no sufficient memorandum in writing of the contract signed by him to satisfy the Statute of Frauds, s. 17. The learned judge ruled that there was, and asked the jury whether the plaintiff, although more than the actual twenty-one days had elapsed, had fulfilled his part of the contract. The jury found that he had, and a verdict was entered for him for 150*l*., with leave to move to enter a verdict for the defendant.

A rule was accordingly obtained on the ground that there was no memorandum signed by the defendant sufficient to satisfy the Statute of Frauds (29 Car. 2, c. 3), s. 17.

Nov. 13. *Powell, Q.C.*, and *R. Vaughan Williams*, shewed cause. The letter of the 9th of February, enclosing the copy contract is a sufficient recognition of the existence of that contract, and of its terms. At all events the two letters of the 8th and 9th of February taken together are enough—and the former can be relied on by the plaintiff; for it is sufficiently connected with the memorandum to be admissible. It is true that in the letter of the 8th of February the defendant insisted on a construction of the contract which differs from that of the plaintiff, but that is consistent with an unqualified admission that the contract existed: *Bailey* v. *Sweeting* (1); *Gibson* v. *Holland* (2); *Wilkinson* v. *Evans* (3).

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Garth, Q.C., and *Shaw*, in support of the rule. The letter of the 9th enclosed a copy of the memorandum, but does not recognize or admit it as containing the terms of the contract, but describes it simply as a "letter." In *Cooper* v. *Smith* (4), a subsequent letter referring to, but not actually recognizing, a previous memorandum, was held insufficient: *Richards* v. *Porter* (5) is in point. There a letter referring to a previous invoice, but stating that the goods had not been supplied in time, was held not to constitute a note in writing. Secondly, with regard to the letter of the 8th of February, it is not sufficiently connected with the memorandum to be available to the plaintiff.

MARTIN, B. I am of opinion that the judge's ruling in this

(1) 9 C. B. (N.S.) 843; 30 L. J. (C.P.) 150.

(2) Law Rep. 1 C. P. 1.

(3) Law Rep. 1 C. P. 407.

(4) 15 East. 103.

(5) 6 B. & C. 437.

case was right. It appears that, on the 11th of January, the plaintiff and defendant met and made a bargain for the purchase, by the plaintiff from the defendant, of some wool; and as the purchase money was more than 10*l.*, it was necessary that the terms of the bargain should be evidenced by writing. Accordingly, a memorandum was drawn up and signed by the plaintiff, and handed by him to the defendant, which, we must take it, correctly represented what the contract really was, and according to which the wool was to be cleared in "about twenty-one days." On the 8th of February, more than the actual period of twenty-one days having elapsed, the defendant wrote the plaintiff a letter in which he says: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract." Now what is the true meaning of this? Can it be anything but this: "You and I have a contract"—for a "deal" must mean a contract—"and according to my reading of one of the terms of it, you have not completed your part, and so I give you notice that it is off." Then the parties met, and the plaintiff asked for a copy of the "contract;" and the defendant in reply, on the 9th of February, wrote as follows: "I beg to enclose copy of your letter of the 11th January, 1871" [then followed a copy of the memorandum]. Now it is said that because the defendant uses the words "copy of your *letter*" he has not recognized the existence of the contract contained in the enclosed memorandum. I cannot take this view of the matter. But, at all events, taking the two letters of the defendant together, I think they amount to a recognition by him that there was a contract with the plaintiff on the true construction of which he thought that he was free, and that the memorandum of the 11th of January contained the terms of that contract. This being so, s. 17 of the Statute of Frauds is satisfied; for it has been frequently held that all that is necessary is to shew written evidence of the true terms of the bargain, signed by the party to be charged. Here, it seems to me, there was ample evidence effectually to bind the defendant.

With regard to the cases cited for the defendant, they are, in my judgment, perfectly correct; and I do not think my conclusion in the present case is contrary to any of them. No doubt attempts have often been made to make some writing, never intended to be, or to recognise, a contract—such, for example, as an invoice—binding on the persons signing it. A writing of that character has rightly been held insufficient. But here the defendant has signed documents which unequivocally recognize the existence of a contract in the terms of the memorandum, and it is consistent with all the authorities to hold that signature enough to satisfy the statute.

CHANNELL, B. I also think this rule should be discharged. In order to succeed, the plaintiff must show, first, that there was a contract, and, secondly, that his part of it has been fulfilled; and the two questions, whether there was a contract, and if there was, whether it has been fulfilled, are quite distinct. The jury have answered the latter in the plaintiff's favour, and all we have to decide is whether there was a sufficient memorandum in writing of the contract or not. Now, all that the statute requires is that the terms of the bargain should be proved by written evidence. Suppose, for instance, an agreement to buy goods at a fixed price, and a memorandum drawn up silent as to price, although the price was actually fixed, there would be no good contract. Again, a memorandum not disclosing the names of both parties would not be a good contract. But here all the terms were reduced to writing, and the defendant has, in fact, admitted that the written paper contained them all. If, when he inclosed the copy memorandum, he had said, "I send you a copy of your letter, but it does not constitute evidence of any contract between us, because one term agreed on between us is entirely omitted," the case would have been different. But he does nothing of the sort. He had put a construction on one of the terms which is incorrect, as the jury have found, and made that an excuse for withdrawal; but his admission of the contract and its terms was unequivocal. The case cited as to the invoice is distinguishable. An invoice alone is no contract, although in some cases, as when a memorandum is indorsed upon it, it may be evidence of one. I am therefore of opinion that the judge's ruling was right, and that the verdict ought to be sustained.

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CLEASBY, B. I am of the same opinion; and when the facts of this case are ascertained, I think it free from doubt. The plaintiff and defendant had a "deal" for wool in January. A memorandum containing all the terms was drawn up, signed by the plaintiff, and handed to the defendant. The fact, therefore, of there being a contract is clear. Then a dispute arose because the plaintiff did not take away all the wool in twenty-one days, and the plaintiff demands to see a copy of his memorandum; and the question is whether the letter of the 9th of February recognized a copy of the terms of the contract or of what was the plaintiff's "letter" only. If the defendant only recognized a copy of a *letter*, there is no sufficient note in writing of the contract. But the previous circumstances shew that such cannot be the proper construction of the language he uses. First, there is the letter of the 8th of February, referring to the "deal" in January, and not in any way repudiating it, but insisting on a particular construction of one of its terms. Then the parties meet, and the plaintiff asks in terms for a copy of "the contract"; and then the defendant sends, in the letter of the 9th, a copy of the document which he had received as a memorandum on the 11th of January. Under these circumstances, his calling the inclosure a copy of a "letter" comes to nothing. It really was a copy of the memorandum, and was sent as such by the defendant. I am of opinion that by so sending it in a letter signed by himself, the defendant bound himself within the 17th section of the statute.

Rule discharged.

Attorneys for plaintiff: *Roy & Cartwright.*
Attorney for defendant: *Woodard.*

HEAD *v.* TATTERSALL.

1871
Nov. 17.

Vendor and Purchaser—Sale of Specific Chattel—Right of Return—Injury to Chattel whilst in Purchaser's Possession—Warranty—Knowledge of Breach of Warranty.

7CP441,
5ExD178
5CPD32

The plaintiff, on Monday, the 13th of March, 1871, bought a horse of the defendant, warranted to have been hunted with the Bicester hounds. By a condition of the contract he was to be at liberty to return the horse if it did not answer its description up to the Wednesday evening following the sale. Previous to removing it from the defendant's premises he was told by the groom who had charge of it, but who was not in the defendant's employment, that it had not, nor had it, in fact, been hunted with the Bicester hounds. The plaintiff, nevertheless, took the horse away. Whilst it was in his possession, though not through any neglect or default on his part, it met with an accident which depreciated its value. He returned it before the Wednesday evening, and brought an action to recover the price he had paid for it:—

Held, first, that the plaintiff's conduct in removing the horse after the information given him by the groom did not deprive him of his right under the contract to return the horse; and, secondly, that his right to return it was unaffected by an accident having happened to it whilst it was in his possession, without neglect or default on his part.

Declaration. 1st count: for breach of a warranty that a certain horse bought by the plaintiff of the defendant had been hunted with the Bicester and Duke of Grafton's hounds.

2nd count: that the defendant, by warranting that a certain horse had been hunted with the Bicester and Duke of Grafton's hounds, sold the same to the plaintiff for an agreed price paid to the defendant; that the warranty was upon the condition that the defendant should not be responsible unless the plaintiff returned the horse before 5 o'clock on the Wednesday evening next after the sale: yet the horse had not been hunted with the Bicester, &c., hounds, and was returned before the time specified.

3rd count: for money received to the plaintiff's use.

The defendant denied the warranties and breaches alleged in the 1st and 2nd counts, and further pleaded to the 2nd count, 6thly, that it was a condition that the horse, if returned, should be returned in the same state as that in which it was delivered to the plaintiff, and without having been injured; and that it was returned in an injured and damaged state. To the 3rd count, he pleaded never indebted.

Replications: 1st, joining issue on all the pleas; and, 2ndly, to the sixth plea, that it was a further condition that the plaintiff might return the horse, although injured and not in the same state as when it was delivered to the plaintiff, if such injury and alteration of condition were not caused by the plaintiff's neglect or default; and that the horse's not being in the same state, and being injured when returned, was not caused by any neglect or default of the plaintiff's. Issue.

The cause was tried before Kelly, C.B., at the Middlesex sittings after Trinity Term 1871, when the following facts were proved: The plaintiff, on Monday, the 13th of March, 1871, bought of the defendant, who is an auctioneer, for 43*l.* 1*s.*, a horse, described in the catalogue as having been hunted with the Bicester and Duke of Grafton's hounds. The contract of sale contained a condition that "horses not answering the description must be returned before 5 o'clock on Wednesday evening next; otherwise the purchaser shall be obliged to keep the lot with all faults."

After the sale the plaintiff learnt from the groom under whose charge the horse had been, but who was not a servant of the defendant, that it had not, in fact, been hunted with the Bicester and Duke of Grafton's hounds. This information was correct. As, however, he did not buy the animal for hunting purposes, he took it away for trial the same afternoon. On the road from the defendant's premises to the plaintiff's stables, and whilst under the care of the plaintiff's servant, it took fright and seriously injured itself by running against the splinter-bar of a carriage. The plaintiff returned the horse before 5 o'clock on the Wednesday evening as not corresponding to the description, and brought this action for the price he had paid. It was not disputed that the warranty or description was a mistake, but it was contended that under the circumstances the plaintiff had no right to return the horse.

The jury, in answer to questions left them by the learned judge, found that the plaintiff was induced by the warranty to buy the horse, and that the injury sustained by the horse was not caused through any negligence or default of the plaintiff's servant. A verdict was thereupon entered for the plaintiff for £43 1*s.*, with leave to move to enter a verdict for the defendant, or to reduce the damages to a nominal sum.

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A rule was afterwards obtained to enter a verdict accordingly, on the ground that the sale of the horse was not under the warranty, and that it could not be returned in the same condition as at the time of the sale; or to reduce the verdict, or for a new trial, on the ground that the plaintiff was only entitled to nominal damages, and not to the price paid by him.

Nov. 17. *Hon. G. Denman, Q.C.*, and *Willoughby*, shewed cause. The plaintiff had a right under his contract to return the horse up to the Wednesday evening. Nothing occurred to deprive him of this right. He was not bound to rescind the contract immediately on receiving information from the groom. He was entitled to take the horse away, and keep it until the time specified had expired: *Bannerman* v. *White.* (1) Secondly, with regard to the accident, that does not affect the question, as it was not owing to the plaintiff's default.

H. James, Q.C., and *Henry Graham*, in support of the rule. The plaintiff, by removing the horse after the conversation with the groom, elected to treat the contract as binding in spite of the mistake in the catalogue. But if this be not so, the plaintiff was deprived of his right of return by the fact of the horse being injured whilst in his possession. If returned at all, the horse should have been returned in the same condition as when sold. The injury might have caused the horse's death, when the plaintiff would certainly have been confined to an action on the warranty. A contract cannot be rescinded unless the parties to it can be replaced in statu quo: *Curtis* v. *Hannay* (2); *Beed* v. *Blandford* (3); *Clarke* v. *Dickson* (4); *Moss* v. *Sweet.* (5) *Bannerman* v. *White* (1) is not in point. There the goods were repudiated before receipt.

KELLY, C.B. I think this rule should be discharged. The action is brought to recover back the price of a horse bought by the plaintiff on Monday, the 13th of March last, under a special contract. The horse was warranted to have been hunted with the Bicester and Duke of Grafton's hounds; and the contract also contained a condition that in case it did not answer the description it was to be returned before five o'clock on the Wednesday following, "otherwise the purchaser shall be obliged to keep the lot with all faults." This clause clearly imposed on the buyer a liability to keep the horse altogether, however worthless it might be, if he should keep it beyond the time named; but, on the other hand, up to that time there was to be a power to return it, if it proved not to be according to warranty. Now it is admitted that the horse had never been hunted with the Bicester hounds, and also that it was returned before five o'clock on the Wednesday. But two objections are raised to the plaintiff's right of return. First, it is said that he had notice before he removed the horse from the defendant's premises that the warranty had not been complied with; and, although the exact character of the communication made to the plaintiff is doubtful, there is evidence that he had learnt, before removing the animal, that it had never been hunted with the Bicester hounds. I do not think, however, that this bound the plaintiff to return it immediately. Under his contract he had till the Wednesday evening to consider whether he would keep it or not, to make further inquiries, if he thought fit, as to the truth of what he had heard, and to come to a final decision. Then, secondly, it is said that, assuming his right to return remained, he could only exercise it if the horse continued in the same condition as at the time of sale, and that, inasmuch as the horse was injured between that time and the Wednesday, the right was lost. To support this proposition several cases were cited which establish the unquestionable proposition that, as a general rule, no contract can be rescinded unless the parties can be replaced exactly in their original position. But these cases do not apply to a contract expressly stipulating for a right of return for a certain time, and on specified grounds. The case of *Curtis* v. *Hannay* (1), which was much relied on by the defendant, and which is the only one I will refer to, really has no application here. It only decides that, in a particular state of circumstances, a plaintiff may disentitle himself by his conduct from returning a specific chattel. There the plaintiff himself kept the horse which he had bought, and tried to cure it of the disease from which it was suffering, and so lost the right of returning it. Indeed the injury to the horse, which took place in that case, may well have resulted from the course of treatment which was adopted. Now, in the present case, it is true that the horse was injured whilst under the plaintiff's control, but not by his default, as the jury have expressly found. In my opinion, therefore, he did not thereby lose his right of returning it, any more than if it had been attacked in the stable with some complaint which greatly lessened its value, but for the existence of which the plaintiff was not responsible. Both objections therefore fail, and the verdict should accordingly remain undisturbed.

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(1) 10 C. B. (N.S.) 844; 31 L. J. (C.P.) 28.

(2) 3 Esp. 82.

(3) 2 Y. & J. 278.

(4) E. B. & E. 148; 27 L. J. (Q.B.) 223. 4 Jur. N.S. 832.

(5) 16 Q. B. 493.

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(1) 3 Esp. 82.

BRAMWELL, B. I am of the same opinion. It is admitted here that the horse did not correspond with the warranty, and that a return would have been competent to the plaintiff unless he had done something to deprive him of his right. The defendant contends that he has been so deprived, on two grounds. First, he took the horse away, it is said, after notice that the warranty was inaccurate, and thereby waived his right to object. But he had no notice when he bought the animal, and so acquired a right to take it away and keep it until the time named in the special condition. This right was not, in my opinion, affected by the information he obtained from the gossip of the owner's groom. If there had been no express clause in the contract as to the time for return, and if, after the sale, the plaintiff had received distinct notice that the warranty was a mistake, then I agree that he must have returned the horse within a reasonable time; and I think a reasonable time would be as soon as he could after the notice. Here there is an express condition, and I cannot hold that the plaintiff lost the benefit of it by the mere act of removing the horse after the conversation with the groom. Suppose the horse had already been in the plaintiff's stable when he received the notice, he would undoubtedly still have had till the Wednesday evening to consider what he would do. The fact of the notice, such as it was, preceding the actual removal, seems to me to make no difference.

But then it is said the right to return was lost, because the rule is that a buyer cannot return a specific chattel except it be in the

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same state as when it was bought. That is quite true as a general proposition, but in such a case as the present the rule must, in my opinion, be qualified thus:—The buyer must return the horse in the same condition as when he bought it, but subject to any of those incidents to which the horse may be liable, either from its inherent nature, or in the course of the exercise by the buyer of those rights over it which the contract gave. For example, suppose the horse, while standing in the stable, strained itself or injured a limb, that would not affect the right of return, although the horse would no longer be exactly in the same condition as before. So here, where, without the plaintiff's default, but while he was doing with the horse what he had a right to do under his contract, the horse was injured, I do not think the right to return it was lost. A contrary rule would often produce singular results; for it must be applied to great and small accidents alike; so that a buyer might find himself deprived of his right to return a horse which was not according to warranty in consequence of any trifling hurt it might have suffered—perhaps not causing a difference of five shillings in its value—while in the buyer's possession. It appears to me, therefore, that the cases very properly cited by Mr. Graham as to the necessity, where a contract is rescinded, of the parties being capable of being replaced in their former position, must be taken with the qualification I have indicated.

No doubt, some cases which may be put by way of illustration present difficulties, but they can all be explained if the condition is borne in mind that the right to return remains, in case of alteration of condition only where that alteration is attributable either to the horse's nature or to some inevitable accident, or to some incident to which the horse was liable, while the buyer was exercising his right over it under the contract. Thus, where a buyer, who has bought a horse not warranted to jump, tries it at jumping, and so injures it, it is clear his right of return would be gone, because the accident would be his own fault. He would not be trying the horse by virtue of any right given to him under his agreement. If, however, the injury were caused by reason of a trial necessary to test the warranty the horse was sold under, then the right would remain. The case of a horse dying was also put to us. But there, if the death occurs through some natural disease, or without the purchaser's default, is he to be without a remedy? It may be answered that he might have his action on the warranty. However that might be, I am disposed to think that even in such a case the contract might still be rescinded, just in the same way as I think it could be if the horse sold were to be left at the vendor's by his permission after the sale and were to die there. In this case, therefore, I am of opinion that the plaintiff is entitled to recover, and that the rule should be discharged.

CLEASBY, B. I am of the same opinion. The effect of the contract is to give the buyer an option of returning the horse in a particular event and within a specified time; and although it is clear that he might by his conduct have disentitled himself to exercise his option, he has not, in my judgment, done anything so to disentitle himself in the present case. By taking the horse away he did no more than, under his contract, he had a right to do. Had the facts been different, a question might perhaps arise as to the effect of this removal. Suppose, for example, the defendant had given the plaintiff explicit notice before the horse was removed that the warranty was a mistake, it might perhaps then be said that by taking it away the plaintiff elected to keep it, or at all events to keep it unless it could be returned in the same condition as at the time of sale. But here there was nothing proved but a loose statement by the groom who had charge of the horse; and I think the plaintiff was still at liberty to take the horse away and to return it if, upon further inquiry, it should turn out not to be in accordance with the warranty. This being so, the second question remains, whether the right given by the contract was limited, so as only to confer a right to return the horse, provided it remained in the same condition as it was in when sold. It is a sufficient answer to say, that as a time for returning the horse was expressly fixed by the contract, an accident occurring within the time from a cause beyond the plaintiff's control ought not to deprive him of his right, provided he can return the horse in some shape or other. The case of the death of the animal purchased is different, and need not be considered now. Moreover, the matter may be put thus:—As a general rule, damage

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from the depreciation of a chattel ought to fall on the person who is the owner of it. Now here the effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event when it would revest in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is revested, and he must therefore bear the loss. The cases cited seem to me to be beside the present question, for here there was an express condition in the contract itself giving to the purchaser an absolute right, under certain circumstances, to return the horse. I think, therefore, the plaintiff is entitled to recover.

Rule discharged.

Attorneys for plaintiff: *Willoughby & Cox.*
Attorneys for defendant: *Markby & Terry.*

Nov. 23.

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8 Ch 610, -8
10 CP 62
10 Ch 412.
6 CP. 553-
0 Ch 637.
6 CP. 652
654,

Double Insolvency—Claim of Bill-holder—Insolvency of Drawer and Accepter—Bill drawn against Specific Cargo—Bill-holder's Right to Proceeds of Cargo—Equitable Rights.

In the ordinary course of business between P. & Co. and the defendant, P. & Co. bought, on the 14th of September, 1869, a cargo of maize afloat from H., and re-sold it to the defendant on the same day. On the 4th of October they paid H. a deposit of 883*l.* 15*s.*, and drew a bill on the defendant for that amount. The bill having been duly accepted, was discounted by the plaintiffs. As between the defendant and P. & Co. this bill was drawn and accepted on the terms that the proceeds of the cargo should be applied to take it up when due. The defendant, on the cargo arriving, sold it through P. & Co. to C., who closed the sale at their request by paying H. what remained due to him, and taking up directly from him the shipping documents, which had been retained by him. After making this payment a balance of 415*l.* 10*s.* remained in C.'s hands. On the 2nd of December P. & Co. suspended payment and executed an inspectorship deed, to which the plaintiffs assented, and under which they proved. On the 20th of December the defendant executed a composition deed, to which the plaintiffs assented, reserving their rights in respect of the above-mentioned balance. Had P. & Co. not suspended payment, they would have been entitled according to the custom of dealing applicable to the sale of the cargo, and it would have been their duty to have specifically applied the balance to taking up the bill.

The defendant having commenced an action against C. to recover this balance, an interpleader issue was directed between the plaintiffs, who also claimed it, and the defendant. P. & Co. and their trustees under the inspectorship deed were made formal parties to the issue and proceedings, but neither they nor their trustees claimed any interest for themselves in the fund in dispute. On a case stated by judge's order in the course of the interpleader proceedings:—

Held, that the plaintiffs were entitled to have the sum in C.'s hands applied pro tanto to discharging the bill which they had discounted.

SPECIAL case stated on an interpleader issue directed in an action brought by the defendant against Messrs. Coventry and Shepheard, of London, to recover the balance of the price of a cargo of grain sold by him to them, which balance the plaintiffs claimed to have applied in discharge of a bill of exchange drawn upon and accepted by the defendant, and discounted and held by the plaintiffs.

The following are the material facts:—

The plaintiffs are Dublin bankers, and the defendant, at the time when the matters in question took place, was a corn merchant there. There was then also a firm carrying on business at London, Liverpool, and Dublin, as corn merchants and factors, under the style of James Pim & Co., who were in the habit of buying cargoes of grain afloat, and re-selling them to other merchants, and amongst others to the defendant. These were dealings in specific cargoes identified by the name of the ship and other particulars. It is usual in the floating cargo trade for the importers and original sellers to stipulate in the contracts of sale for payment in exchange for the shipping documents representing the cargo; and in subsequent dealings with the cargo the contracts are made upon the same terms. But it is also common in practice for the original sellers to retain the shipping documents, even until after the ship has arrived and the cargo is ready for delivery, and in the mean time to require from the buyers a deposit of part of the price on account.

According to the course of business between James Pim & Co. and the defendant, when the former bought a floating cargo and re-sold it to the defendant, they forwarded the usual contract note of the sale, but allowed the shipping documents to remain in the hands of the original sellers, and when a deposit was required drew a bill on the defendant against the cargo for the amount.

This bill they discounted, and with the proceeds paid the deposit to the original sellers. As between James Pim & Co. and the defendant, such a bill was drawn and accepted on the terms that the particular cargo and its proceeds should be applied to take up the bill when due, or, if the deposit was already paid, Pim & Co. were entitled to reimburse themselves out of the proceeds of the cargo, to which the defendant was not entitled without providing for the bill.

On the 14th of September, 1869, James Pim & Co. bought in the course of business a cargo of maize, per *Paolo*, from Messrs. Horne & Co., and on the same day re-sold to the defendant at an advance of 9*d.* a quarter above what they had to pay Horne & Co. On the 4th of October, 1869, they paid a deposit of 883*l.* 15*s.*, and drew on the defendant at three months for that amount. The bill, having been duly accepted, was discounted by the plaintiffs. When it became due there was a large balance owing by the defendant to James Pim & Co. After the arrival of the cargo the defendant, in November, 1869, through James Pim & Co., as his brokers, sold it to Messrs. Coventry & Shepheard at a lower price than that originally agreed to be paid to Horne & Co., but the difference being less than the deposit, Coventry & Shepheard, at James Pim & Co.'s request, closed the sale by paying Horne & Co. what remained due to them, and taking up the shipping documents from them directly. On the conclusion of these arrangements a balance of 415*l.* 10*s.* remained in the hands of Coventry & Shepheard, for which the defendant brought the action out of which these interpleader proceedings arose.

On the 2nd of December, 1869, James Pim & Co. suspended payment, and executed an inspectorship deed, to which the plaintiffs assented, and proved thereunder for the amount of the bill. On the 20th of December, 1869, the defendant executed a composition deed, to which the plaintiffs assented, reserving their rights in respect of the above-mentioned balance. The trustees under this deed declined to recognize the plaintiffs' claim to a dividend until after the question raised by this case had been disposed of. Had James Pim & Co. not suspended payment, they would have been entitled, in the regular course of business, and it would have been their duty, to have specifically applied the balance to taking up the bill. The question for the Court was, whether the plaintiffs were entitled to have the sum in Coventry & Shepheard's hands applied pro tanto to discharging the bill, or whether it should be paid to the defendant.

During the course of the argument, James Pim & Co., and their trustees under the inspectorship deed, were added by consent as nominal defendants; but did not make any claim to the balance.

Nov. 20, 22, and 23. *Watkin Williams* (*Cohen* with him), for the plaintiffs, relied on *Powles* v. *Hargreaves* (1), where the principle established in *Ex parte Waring* (2), in the case of a double bankruptcy, was extended to the case of a double insolvency without actual bankruptcy; and contended that according to those authorities the plaintiffs here were entitled to the proceeds of the cargo. In *Ex parte Alliance Bank* (3) the doctrine of *Ex parte Waring* (2) was held not to apply to the particular circumstances, but its correctness was recognized in the judgments. In *Laycock* v. *Johnson* (4) there was a dictum by Wigram, V.C., that the principle was confined to judicial insolvency, which, however, has not been approved or acted upon.

Watkin Williams also appeared for James Pim & Co., and their trustees.

Dowdeswell, Q.C., for the defendant, contended that neither of the cases cited governed the present case. *Ex parte Waring* (2), laid down an arbitrary rule, applicable only to the particular state of circumstances. Moreover there, as in *Powles* v. *Hargreaves* (1), the money sought to be recovered by the bill-holders had reached the hands of those representing the bankrupt and insolvent respectively. Here Messrs. Coventry & Shepheard still retained the balance, and although when received from them, James Pim & Co. would have been entitled to apply it to the discharge of the bill, that was not a right capable of being transmitted to the plaintiffs, who have proved under the inspectorship deed for the amount of the bill. Again, James Pim & Co. and the defendant, by their conduct and dealings with Coventry & Shepheard, deviated, as to this cargo, from the ordinary course of their business, and the former lost the right of specific appropriation of the cargo.

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(1) 3 D. M. & G. 430. 17 Jur 1083

(2) 19 Ves. 345.

(3) Law Rep. 4 Ch. 423.

(4) 6 Hare, 199, at p. 209.

Watkin Williams was not called upon to reply.

KELLY, C.B. The question put to us in this case is, whether the sum sought to be recovered ought to be applied towards taking up the bill of exchange discounted by the plaintiffs, or whether it ought to be paid to the defendant; and there might be some difficulty in answering it if Pim & Co., and their trustees, had not been made parties to these proceedings. But now that they are represented before us, the difficulty disappears, and I am clearly of opinion that our judgment should be for the plaintiffs. The case clearly shews that Pim & Co. had an equitable lien upon the cargo by the *Paolo,* and consequently on the money due from Coventry & Shepheard, until they should have been repaid the amount of the deposit paid by them; and it is expressly found that, had they not suspended payment, they would have been entitled, according to the regular course of business between them and the defendant, to have specifically applied the proceeds of the cargo to the taking up of the bill, and it would have been their duty to do so. Is there any reason why the plaintiffs should not have the proceeds of the cargo so applied, although James Pim & Co. and the defendant have both become insolvent, and they have proved for the amount of the bill under the deeds of inspectorship and arrangement? I can find none, now that we have, in effect, all the parties before us, and can see what are their respective rights. First, there are Messrs. Coventry & Shepheard, who disclaim any title to the fund in question, and are ready to pay it into court to be dealt with by us. Secondly, there are James Pim & Co., who have been added as nominal defendants, and appear by counsel. They, too, renounce all claim to the fund for themselves; and although they might be entitled to it for the moment, they could only take it to hand it over to the plaintiffs. Thirdly, there are the trustees of James Pim & Co., who cannot lay any claim to the money; for it never has been and never could be received by James Pim & Co. as part of their estate, and could not be available in the trustees' hands for the general body of their creditors. It is money clothed with an equity in favour of the plaintiffs. Fourthly, there is the defendant, who in no possible point of view can have any right to this balance, for he has not paid this bill for £883 15*s*., which is part of the price of the cargo bought by him of James Pim & Co. Fifthly, there are the defendant's trustees, who can only possess such rights as he had himself. They can have no interest or desire except to see the balance paid to the plaintiffs; for otherwise the plaintiffs would be entitled to prove against the defendant's estate for the whole sum.

I have thus considered the position and rights of all the parties except the plaintiffs themselves, and I can find no answer to the claim they make. Suppose there had been no insolvency either of the defendant or of James Pim & Co., their right would have been indisputable, and, in my opinion, unaffected by the mode in which Coventry & Shepheard were dealt with. The occurrence of those insolvencies introduces a new element into the case, but now that we have all the parties before us, I do not see any reason for withholding the balance from the plaintiffs. My judgment, therefore, is for them; but I pronounce no opinion upon what would have been the effect of the findings in this case if James Pim & Co. and their trustees had not become parties to the proceedings. I think that even then, although this money could not have been attached by them in the hands of Coventry & Shepheard, the plaintiffs would in all probability have been entitled to recover it upon the authority of *Ex parte Waring* (1) and *Powles* v. *Hargreaves* (2); but I do not base my decision on this ground. It is enough to say that, having all persons who could by any possibility claim any interest in the fund before us, either actually or constructively, the plaintiffs appear, on the facts of the case, the persons to whom it should be paid.

CHANNELL, B. I am of the same opinion. Looking at the facts found, at the form of the question submitted to us, and at the amendment made by joining James Pim & Co. and their trustees as defendants, I think the case sufficiently clear to enable us to say that the sum in dispute ought to be applied towards taking up the bill of exchange, and ought not to be paid over to the defendant.

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(1) 19 Ves. 345.

(2) 3 D. M. & G. 430.

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10 Ch. 157

CLEASBY, B. I am of the same opinion, and have only a few words to add with regard to the grounds taken by counsel during the argument. The case has been presented to us sitting as a court of equity (1), and we are asked to say that in equity the plaintiffs have a right to the money in dispute. Whether they have or not depends mainly on *Ex parte Waring* (2) and the cases which have followed that decision. I may illustrate by an example what I conceive to be the effect of these authorities. Suppose A. and B. are drawer and acceptor of a bill discounted by a bank, and by the agreement between them, of which the bank at the discount time is utterly ignorant, a certain sum of money or the proceeds of a certain cargo is to be applied in discharge of the bill, then—in the event of both A. and B. becoming bankrupt or insolvent, or, to use a more correct phrase, in the event of there being a forced realization of assets of those two estates—that sum of money, or the proceeds of that cargo, does not form a portion of either estate, but is subject to the equity of going in discharge of the bill. The bill-holder, although he may prove against both estates, does not get the benefit thereby of the specific security set apart by A. and B. towards the discharge of the bill. There is no mode of giving him the fair benefit of the arrangement except by making the security available at once for the payment of the liability; and then the matter readily adjusts itself. Such a right is a peculiar one, for it is not founded upon any interest the bill-holder has in the agreement between the drawer and acceptor; for he has none but that which arises afterwards in consequence of the enforced administration of the assets of both estates. And the principle on which he has this right is not confined to actual bankruptcy, but is applicable also wherever there are two insolvent estates. So it was held in *Powles* v. *Hargreaves* (3), which appears to me precisely in point.

Reference has also been made to the case of *Ex parte Alliance Bank.* (4) There the doctrine of *Ex parte Waring* (2) was held not to apply, on the ground that there was no contract between the two insolvents authorizing the application of the securities in dispute towards the paying of the bills held by the Alliance Bank; but in the judgments of Selwyn and Giffard, L.JJ., the principle of *Ex parte Waring* (1) is entirely assented to. [The learned Judge read several passages from the judgments (2), and proceeded:—] It is impossible for us to do anything but act on these authorities, and, there having been nothing, in my opinion, to get rid of the original contract by which the proceeds of the cargo were bound, we must say that the balance ought to be applied in part satisfaction of the bill.

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(1) See *Rusden* v. *Pope* (Law Rep. 3 Ex. 269), where on a case stated in interpleader issue, the Court (Bramwell, B., dissentiente), held that they could consider an equitable claim by the plaintiff.

(2) 19 Ves. 345.

(3) 3 D. M. & G. 430. 17 Jur. 1083.

(4) Law Rep. 4 Ch. 423.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Freshfields.*

Attorneys for defendant: *Johnson & Coote.*

Attorneys for James Pim & Co. and their trustees: *Thomas & Hollams.*

HINDE *v.* SHEPPARD AND OTHERS.

Nov. 4.

10 C.P. 93.
96-8-9.

Costs—Certificate for Costs—Action which there is sufficient reason for bringing in a Superior Court—30 & 31 *Vict. c.* 142, *s.* 5.

Where an action is brought to try a right, and the right is of sufficient importance to make the action one proper to be brought in a superior court, the Court will make an order for costs in favour of the successful plaintiff, although the judge at the trial has refused to certify.

Hatch v. *Lewis* (7 H. & N. 367; 31 L. J. (Ex.) 26) distinguished.

Rule obtained by the plaintiff, calling on the defendants to shew cause why the plaintiff should not be allowed his costs under s. 5 of 30 & 31 Vict. c. 142.

The plaintiff having purchased a piece of land, part of an unfenced space of about twelve acres, near to the village of Flimby, in Cumberland, inclosed it for building by erecting a fence and posts. The colliers in the neighbourhood had been in the habit of playing at football and other games upon the vacant space, and

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(1) 19 Ves. 344.

(2) Law Rep. 4 Ch. at pp. 428 to 432.

See Sharkey v. Le Blanc 10 L.R. C.P. 93.

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under the direction or by the advice of the defendant Sheppard, the incumbent of Flimby, the other defendants, who were colliers, pulled down the plaintiff's fence and posts, claiming a customary right in the inhabitants of Flimby to play games upon the land. The plaintiff thereupon, on the 13th of June, 1870, brought this action of trespass. The defendants pleaded, on the 29th of June (amongst other pleas), pleas setting up the alleged custom, on which the plaintiff joined issue, and new assigned. The pleadings were not completed in time for the trial of the cause at the summer assizes. The commission day at Carlisle on the ensuing spring assizes was the 16th of February; and on the 3rd of February, under an order obtained on the 31st of January, the defendants amended their pleas, and added pleas of two public highways over the plaintiff's land.

The cause was tried at the spring assizes, before Willes, J., and the jury found for the plaintiff as to the custom, and one of the highways, and for the defendants as to the other. The plaintiff thereupon applied for a certificate for costs, the consideration of which was reserved by the learned judge, who afterwards (but without the plaintiff's consent), upon the defendants undertaking not to move for a new trial, declined to certify. No application was made by the defendants for a new trial.

On the 6th of May the plaintiff made an application to Willes, J., at chambers, for costs, which was refused.

On the 8th of June the present rule was obtained, against which

Quain, Q.C., and *Crompton*, shewed cause, and contended that, on the authority of *Hatch* v. *Lewis* (1), the decision of the learned judge at nisi prius ought not to be reviewed; that under the circumstances he was right in refusing to certify; and that, at any rate, the defendants having now lost their opportunity of moving for a new trial, it would be inequitable to deprive them of the benefit for the sake of which they had abandoned their right.

Holker, Q.C., and *Kemplay*, in support of the rule, contended that in *Hatch* v. *Lewis* (1) the action was only to recover damages, and that the decision did not therefore apply to the present case,

(1) 7 H. & N. 367; 31 L. J. (Ex.) 26.

where the action was brought to try a right; that the present action was one proper to be brought in a superior court, and that the plaintiff was therefore entitled to his costs as of right.

KELLY, C.B. I have the utmost respect for the great legal knowledge and accuracy of my Brother Willes, but I cannot concur with him in the present case. The plaintiff had bought a piece of vacant land at Flimby, but upon his attempting to inclose it for building, the colliers in the neighbourhood, who were in the habit of playing football and other games upon the land, set up a custom in the inhabitants of Flimby to use it for that purpose, and destroyed the fence which he had erected. Thereupon he brought this action against the defendants for the purpose of establishing his right. The defendants pleaded the alleged custom, and for a long time that was the only substantial issue upon the record, and raised the only question which the plaintiff supposed he was going to try. But shortly before the trial the defendants amended their pleadings by adding two pleas of a right of way; and on one of those pleas a verdict was found for the defendants. But that was not the right which had been originally claimed, or in respect of which the trespass complained of had been committed; and the issue which both the plaintiff and the defendants had in the first instance intended to try, namely, the alleged customary right of the inhabitants of Flimby, was found for the plaintiff. I am of opinion that the action, involving as it did a substantial and important right, was one which was properly brought in a superior court, and that the plaintiff having succeeded, is entitled to his costs. It was contended that the case of *Hatch* v. *Lewis* (1) was an authority that the Court would not interfere with the discretion of the judge at nisi prius; but that case was wholly different. It was an action brought for the recovery of damages merely; but the present action is brought to try a right, which, if it existed, would materially affect the value of the plaintiff's land. The position of the plaintiff is not altered by the application made to the judge at chambers, which was only a repetition of the application made at the trial. Neither can he be affected by the understanding said to have been come to between the learned judge and the defendants, to which he was not a party. He has a right now to call upon us to exercise our judgment, and in my opinion he is entitled to have the rule made absolute.

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(1) 7 H. & N. 367; 31 L. J. (Ex.) 26.

BRAMWELL, B. I am of the same opinion. This is not in form an appeal against the judgment of my Brother Willes, but it is so in substance. The question is, whether there was sufficient cause for bringing this action in a superior court; and I think it impossible to say there was not sufficient cause. But where that is so, there is no discretion in the judge to certify; he ought to certify. The action was brought to try a right alleged to exist in the inhabitants of Flimby to play games over a large piece of land, which includes the plaintiff's. It involves, therefore, an interest of large pecuniary value, and also a general right of the inhabitants of Flimby; and no one can doubt that if the action had been brought in the county court it would have been removed into a superior court upon these facts being shewn. That being the right which was claimed, and which the action was brought to try, the defendants, instead of trying the only real question, plead a plea wholly foreign to the matter in dispute. I do not wish to recall anything that I said in *Hatch* v. *Lewis*. (1) That was an action brought only to recover damages, and in such cases it is for the judge at nisi prius to decide as to the propriety of certifying for costs. But here a right is in question, which would have little or no bearing on the amount of damages; and there being sufficient cause for bringing the action in this court, the plaintiff is entitled to his costs.

CHANNELL, B., concurred.

CLEASBY, B. If I had to decide this case, unbiassed by the opinion of my Lord and my learned Brothers, I should have thought we ought not to interfere with the decision of the judge at nisi prius. If the judge is applied to at the trial to certify, he has a general jurisdiction over the costs, and when he has refused the application, I think the Court ought not, without very strong and convincing reasons, to review his decision. The plaintiff

(1) 7 H. & N. 367; 31 L. J. (Ex.) 26.

having chosen to make that application, ought not to be allowed to question it, unless under very exceptional circumstances. I have great difficulty in distinguishing the present case from *Hatch* v. *Lewis* (1), and what was said by my Brother Bramwell in that case (2), with which I entirely agree, appears to me applicable. I cannot see clearly that the learned judge was wrong in refusing to certify. The plaintiff was in the wrong in erecting the fence and posts, which interfered with the right of way. The defendants put down those obstructions, and claimed to exercise, not only a right of way, but also a right to play games upon the land, to which they were not entitled. Both parties, therefore, were in the wrong. The learned judge may have taken this into account in arriving at his decision, and I doubt whether we ought to overrule it. But out of deference to the opinion of the rest of the Court, I do not dissent from their judgment.

Rule absolute.

Attorneys for plaintiff: *Gregory & Co.*
Attorneys for defendants: *Sharpe & Ullithorne.*

(1) 7 H. & N. 367; 31 L. J. (Ex.) 26.

(2) 7 H. & N. at pp. 375–6; 31 L. J. (Ex.) at pp. 30, 31.

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Dec. 2.

[IN THE EXCHEQUER CHAMBER.]

CLOUGH *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Fraud—Avoidance by Plea of Contract obtained by Fraud—Return of Consideration—Plea by Carrier of Fraud upon Sender of Goods.

8 Ex 50
— 206
9QBD98
1QBD85

A company sold goods, alleged to be for exportation, to one Adams, for 205*l.*, and took in payment 68*l.* in cash, and his acceptance for the residue. By his direction they forwarded the goods by the defendants' line to the plaintiff at Liverpool, who was alleged by Adams to be his shipping agent. Afterwards, having reason to suspect the solvency of Adams, they directed the defendants to stop the goods in transitu, but this message did not arrive at Liverpool until after the transitus had been determined. The defendants afterwards, at the request of the company, returned them the goods. No act avoiding the contract on the ground of fraud was done by the company until plea in this action.

The plaintiff having brought an action against the defendants for the goods, the defendants pleaded fraud in Adams, to which the plaintiff was privy. At the trial, the jury found that Adams obtained the goods with the intention of not paying for them; that the plaintiff had advanced to Adams a sum of 250*l.* (out of which the 68*l.* was paid), but that the advance was not bonâ fide; and that at the time he advanced it he knew of the fraudulent intention of Adams. The judge directed a verdict for the defendants with leave to amend; and with leave to the plaintiff to enter the verdict for him for 205*l.*, if the Court should think that the defendants were not entitled to the verdict, either on the pleas as they stood, or upon any possible amendment thereof.

The Court below having made absolute a rule obtained by the plaintiff to enter a verdict for him:—

Held (reversing the judgment of the Court below), that the defendants were entitled to retain their verdict; for that an equitable plea would be good which stated that the goods had been sold to Adams and delivered by the company to the defendants for the purpose of being delivered to the plaintiff under a contract induced by the fraud of Adams, to which the plaintiff was privy; that the company, under a mistaken supposition that the transitus was still subsisting, obtained from the defendants the re-delivery of the goods to them, which was a breach of the contract between the defendants and the plaintiff; but that afterwards, and after action commenced, the company having discovered the fraud, and that the plaintiff was privy to it, did elect to rescind the contract, and revest the property in the goods in themselves, and that this was done before any act was done by them affirming the contract, or otherwise determining their election; that no interest had vested in any innocent person rendering it inequitable or unjust to rescind the contract; and that the plaintiff was inequitably proceeding with the suit for the purpose of obtaining in damages from the defendants on the record and the company, who were the real defendants, the value of the goods thus revested in the company.

Held, also, that, although in an action by Adams against the company it might have been necessary in pleading a similar plea to have brought into court the money paid by him to them, it was not necessary in this action either to bring the money into court, or to aver readiness and willingness to return the money, inasmuch as Adams was not a party to the action.

APPEAL from the decision of the Court of Exchequer making absolute a rule obtained by the plaintiff to enter a verdict for him.

June, 18, 19. *Quain, Q.C.* (*Pike* with him), for the defendants cited *Campbell* v. *Fleming* (1), *Clarke* v. *Dickson* (2), *Stevens* v. *Austin* (3), 2 Parsons on Contracts, 277, and *Belshaw* v. *Bush.* (4)

Simon, Serjt. (*R. G. Williams* with him) for the plaintiff, cited *Newnham* v. *Stevenson* (5), *Deposit & General Life Assurance Company* v. *Ayscough* (6), *Bwlch-y-Plwm Lead Mining Company* v. *Baynes* (7), *Pease* v *Gloahec.* (8)

The facts, pleadings, and arguments are fully stated in the judgment of the Court.

Cur. adv. vult.

Dec. 2. The judgment of the Court (Byles, Blackburn, Mellor, and Lush, JJ.) (9) was delivered by

MELLOR, J. This is an appeal from the judgment of the Exchequer making absolute a rule to enter the verdict for £205 in pursuance of the leave reserved at the trial.

To make the case intelligible it is desirable to call attention to the dates. The writ in the action was issued by the plaintiff Clough on the 2nd of June, 1868, against the London and North Western Railway Company, who are the defendants on the record. The London Pianoforte Company, who are the parties really interested, and who have indemnified the defendants on the record, appeared in their name.

The declaration was delivered on the 30th of June, and contained

(1) 1 Ad. & E. 40.

(2) E. B. & E. 148; 27 L. J. (Q.B.) 223. 4 Jur. N.S. 838

(3) 1 Metc. R. 557.

(4) 11 C. B. 191; 22 L. J. (C.P.) 24.

(5) 10 C.B. 713; 20 L. J. (C.P.) 111.

(6) 6 E. & B. 761; 26 L. J. (Q.B.) 29.

(7) Law Rep. 2 Ex. 324.

(8) Law Rep. 1 P. C. 219.

(9) Montague Smith, J., was also a member of the Court when the case was argued, but before judgment was delivered he had quitted the Court of Common Pleas upon being appointed a member of the Judicial Committee of the Privy Council.

(4) S C 17 Jur 67
(6) S C 2 Jur N.S. 812

three counts; 1st, trover; 2nd, a count against the defendants as warehousemen; 3rd, a count against them as carriers.

The pleas, as the record stood when the trial came on before Mr. Justice Lush, were seven in number; 1. to 1st count, not guilty; 2. to the same, not possessed; 3. to 2nd and 3rd counts, non-assumpsit; 4. to 2nd and 3rd counts, that the plaintiff did not deliver nor defendants receive the goods for the purposes alleged; 5. to the 3rd count, that the goods were sold to Adams on credit; that he was insolvent, and that the vendors stopped the goods in transitu; 6. to the 3rd count, that Adams, by fraud, induced the London Pianoforte Company to part with the possession of the goods, and deliver them to the defendants as carriers, to deliver them to the plaintiff as agent for Adams, and that the London Pianoforte Company, before any breach of contract by the defendants on the record, stopped the goods whilst in transitu. Lastly, 7. to the 3rd count, a plea similar to the 6th, except that instead of alleging that the plaintiff was the agent of Adams, it averred that the plaintiff was privy to the fraud of Adams.

The replication took issue on all these pleas, and also replied to the 5th plea, that there was a bonâ fide assignment by Adams to the plaintiff for value.

Issue was joined on this replication.

There were also demurrers with which neither the judge at nisi prius, nor we who are now sitting as judges on an appeal, have anything to do.

Those issues came on to be tried at nisi prius before Mr. Justice Lush, on the Winter Circuit of 1868, and evidence was given, and to some extent there seems no dispute as to what was proved.

On the 18th of May, 1866, the London Pianoforte Company made a contract with Adams, by which they sold him nine pianofortes, which he stated he was purchasing for exportation, for the price in all of 205*l.* Adams paid them in cash 68*l.*, and accepted a bill at four months for 135*l.* 8*s.*, which, together with a small discount of 1*l.* 12*s.*, represented the whole price. The London Pianoforte Company gave him a receipt, and received his directions to forward the pianos by rail to R. C. Clough, Temple Court, Liverpool, who, Adams stated, was his shipping agent.

The London Pianoforte Company sent them accordingly by the

London and North Western Railway Company, addressed as directed, and they arrived at Liverpool. Clough was not found at the address given, and the London and North Western Railway Company, on the 21st of May, wrote to the London Pianoforte Company, stating that this was the fact, and requesting their directions. Almost at the same time the London Pianoforte Company received information that Adams was a bankrupt; they at 9.30 a.m. on the 22nd of May, sent directions to the London and North Western Railway Company in London to stop the goods in transitu; but the London and North Western Railway Company did not forward this notice to Liverpool by telegraph, and before this intimation arrived at Liverpool by train, Clough, the now plaintiff, had called at the Liverpool station of the London and North Western Railway Company, and enough took place between him and the London and North Western Railway Company to put an end to the transitus, the London and North Western Railway Company agreeing with him to hold the goods no longer as carriers, but as warehousemen, for him.

The London Pianoforte Company, nevertheless, required the London and North Western Railway Company to send the pianos back to London to them, and the London and North Western Railway Company, on receiving an indemnity from them, did so.

The London Pianoforte Company, on the 23rd of May, wrote to Adams, informing him that Clough had not been found at his address, and telling him that they had in the mean time ordered the pianos back until they heard from him.

On the 27th of May, the plaintiff demanded the pianos from the London and North Western Railway Company, and heard that they had been returned to the London Pianoforte Company. On the 2nd of June the plaintiff Clough issued the writ against the London and North Western Railway Company.

Up to this time it is clear, as a matter of fact, that the London Pianoforte Company were treating the contract as an existing one, and were relying on their right to stop in transitu; but there is nothing whatever to shew that they were as yet aware that the contract was one which had been induced by fraud, so as to give them a right to avoid it on that ground.

But at the trial they succeeded, on the cross-examination of

Clough and Adams, in making out a strong case to go to the jury that Adams, who had just been discharged from prison as a bankrupt suing in formâ pauperis, went to London with the plaintiff on a concerted plan to obtain the pianos without paying for them, in order that Clough might sell them by auction and obtain the proceeds, and that the 68*l.* was in fact Clough's money, advanced for the purpose of carrying out the fraud, and that a document given in evidence, by which Adams acknowledged to have received 250*l.* as an advance on the pianos, was a part of the fraud.

The pleas as to stoppage in transitu were not abandoned by the defendants, but insisted upon. Mr. Justice Lush most properly ruled that the evidence shewed that the transitus was ended before the stoppage.

The case then goes on to state as follows:—"The plaintiff's counsel then took the objection that the 7th plea, which set up the plaintiff's privity with Adams' fraud, was pleaded to the 3rd count of the declaration, which was against the defendants as carriers, and that there was no similar plea to the 2nd count, which was against the defendants as warehousemen."

The defendants' counsel asked leave to amend, which was granted, Mr. Justice Lush holding that it raised no new question, but merely set the pleas right to raise the question which the parties came to try, and that such amendment was necessary to raise the real question at issue between the parties.

Mr. Justice Lush left three questions to the jury, viz.:—1. Did Adams obtain the goods with the intention of not paying for them? 2. Did Clough in fact advance the 250*l.*? Did he at the time he advanced it know of the fraudulent intentions of Adams?

The jury answered the above questions as follows:—To the first: He did. To the second: He did, but not bonâ fide. To the third: Yes.

Upon these findings a discussion followed with respect to the pleadings; and ultimately Mr. Justice Lush directed that the verdict should be entered for the defendants, the pleadings to be taken as amended; but if the Court should think that the defendants were not entitled to the verdict, either upon the pleas as they stood, or *upon any possible amendment* thereof, then the verdict to be entered for the plaintiff for 205*l.*

It is stated in the case that the bill and the 68*l.* remained, and still remain, in the possession of the London Pianoforte Company. Adams never demanded the return of either, nor did the Pianoforte Company ever offer to return them. It is to be observed that neither in the pleas, as they stood before the leave to amend was given, is there any averment that the defendants were ready and willing to restore the 68*l.*, nor in the replication is there any averment that the defendants still retained the money, though Adams claimed it. And we learn from Mr. Justice Lush that nothing whatever was said by either party, either on the examination of their witnesses, or in their addresses to the jury, on this point, or he would certainly have taken the opinion of the jury on it.

There can be no doubt, as Adams was there present giving evidence in favour of the plaintiff, and endeavouring to support the fraud, the jury, if asked, must have found at least that neither he nor the plaintiff was ever ready to receive back the money and bill, and thereby admit that the contract was fraudulent and voidable on that ground.

No distinct evidence was given as to when the London Pianoforte Company first became aware that the plaintiff was privy to the fraud. They clearly had enough information to lead them to assert it at the time when they pleaded the last plea; but probably, as Mr. Quain said, they had not more than suspicion till the plaintiff was cross-examined. No suggestion was made as to the importance of the date of their knowledge, and no question was asked of the jury on that head.

We think that we must construe the reservation as meaning that the plaintiff was not to have the verdict entered for him, if on these facts and findings there was any defence which might have been made the subject of a good plea, either on legal or on equitable grounds. If there was evidence of any such defence, but the opinion of the jury was not taken on some material point when it ought to have been, it may entitle the plaintiff to a new trial, but not to have the verdict entered for him.

The last plea actually pleaded on the record to the 3rd count only, and which was most properly amended by applying it to all the counts, was not proved, inasmuch as it averred that the discovery of the fraud was *before any breach of contract* by the defend-

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ants on the record, whilst, in fact, the evidence proved that it was after a breach of contract by them, and probably after the action was commenced. It certainly was before the case went to the jury. And the pleas which the defendants have since the trial delivered, are subject to the same defect. But on the reservation the plaintiff is not to have the verdict entered for him if "upon any possible amendment of the pleas," the defendants would be entitled to the verdict. And we think that a plea might be framed, stating that the goods had been sold to Adams, and delivered by the London Pianoforte Company to the railway company, for the purpose of being delivered to the plaintiff under a contract induced by the fraud of Adams, to which the plaintiff was privy; that the London Pianoforte Company, under a mistaken supposition that the transitus was still subsisting, obtained from the railway company the re-delivery of the goods to them, which was a breach of the contract between the railway company and the plaintiff; but that afterwards, and after action commenced, the London Pianoforte Company having discovered the fraud, and that the plaintiff was privy to it, did elect to rescind the contract, and revest the property in the goods in themselves, and that this was done before any act was done by them affirming the contract or otherwise determining their election; and that no interest had vested in any innocent person rendering it inequitable or unjust to rescind the contract; and that the plaintiff was inequitably proceeding with the suit with the purpose of obtaining in damages, from the defendants on the record and the London Pianoforte Company, who were the real defendants, the value of the goods thus revested in the London Pianoforte Company.

Such a plea, we think, would have been proved, and would have furnished a complete answer, probably at law, but it is enough now to determine that it would have been good on equitable grounds.

This is contrary to the judgments in the Court below, and it is proper to point out what they seem to consider the fatal defects in such a plea, and then to render the reasons that make us think those not fatal.

The Chief Baron seems to base his judgment on the principle, that it was necessary that there should be an averment in the plea,

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and proof at the trial, of some communication to the plaintiff shewing that the London Pianoforte Company had elected to rescind the contract before the commencement of the action. The three other judges do not seem to put it on that ground; but they all agree with the Chief Baron in thinking that it was essential that the London Pianoforte Company should do some act, before and independent of delivering a plea, indicating their intention to avoid the contract; and that this act should be accompanied by an offer, or at least an expression of their readiness and willingness, to hand over the 68*l.* and the acceptance which they had received on the footing that the contract was valid, and which they had no right to retain after the contract was avoided.

These objections, if good, would certainly apply to the plea we have supposed, whether it was pleaded at law or on equitable grounds. There is a further objection to the plea as a plea at law, that the rescission came after the plaintiff had a vested cause of action against the London and North Western Railway Company, and that it could not operate to defeat that vested cause of action by relation. If it were necessary to decide this, we should have to say whether we would follow the opinion expressed in the end of the judgment of the Exchequer Chamber in *Stevenson* v. *Newnham* (1), delivered by Parke, B., from which Erle, J., dissented, or the equally strong opinion expressed by Cresswell, J., in *Young* v. *Billiter* (2), apparently concurred in by the majority of the Exchequer Chamber in that case.

It is not necessary to form any judgment as to this controverted point, for it is clear that as a court of equity interferes on the principle of granting relief to the defrauded party, from whom the fraudulent party against conscience seeks to obtain the fruits of his fraud, no such point could arise on a plea pleaded upon equitable grounds, and as the leave is reserved, it is enough if a good plea on equitable grounds could have been pleaded.

It is also to be observed, that the supposed plea, being of a matter that occurred after action brought, the plaintiff might have confessed its truth and taken judgment for his costs up to the time of plea pleaded. But it is obvious here, that the plaintiff

(1) 13 C.B. at p. 303; 22 L. J. (C.P.) at p. 115. 17 Jur 660,-1

(2) 6 E. & B. at p. 33; 25 L. J. (Q.B.) at p. 181.

never would have confessed it and acknowledged his fraud. He must be considered as having taken issue on it.

6 HL 119

8 Ex 203,
2 CCR 44
48, 49, 50
53, 7, 63, 4,
70

6 PC 375

3 App Cas
1271
app Cas 360

We now proceed to examine the grounds on which we understand the judges in the court below proceeded; and to give our reasons for coming to a different conclusion. We agree completely with what is stated by all the judges below, that the property in the goods passed from the London Pianoforte Company to Adams by the contract of sale. The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. This was not controverted at the bar, and it is not necessary to cite authorities for it.

And we further agree that the contract continues valid till the party defrauded has determined his election by avoiding it. And, as is stated in Com. Dig. Election, C. 2, if a man once determines his election it shall be determined for ever; and, as is also stated in Com. Dig. Election, C. 1, the determination of a man's election shall be made by express words or by act. And, consequently, we agree with what seems to be the opinion of all the judges below, that if it can be shewn that the London Pianoforte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined for ever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shews his intention to treat the lease as subsisting, he has determined his election for ever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shews his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture: *Jones* v. *Carter*. (1) We cannot do better than to cite the language of

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(1) 15 M. & W. 718.

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6 PC 375

Bramwell, B., in *Croft* v. *Lumley* (1), which precisely expresses what we mean. He says, "The common expression 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has a right of re-entry, he may elect to avoid or not avoid the lease, and he may do so by deed or by word; if, with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the statute of Anne), or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, and does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? or has he elected to avoid it? or has he made no election?"

In all this we agree, and think that, mutatis mutandis, it is applicable to the election to avoid a contract for fraud.

In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election?

We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind.

2 CCR 44
3 App Cas 1278

And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined. But we cannot see any principle, and are not aware of any authority, for saying that the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescission, is such a change of position as would preclude the defrauded party from exercising his election to rescind.

Neither can we see the principle or discover the authority for

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(1) 6 H. L. C. at p. 705; 27 L. J. (Q.B.) at p. 330. 4 Jur NS 908-9

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saying that it is necessary that there should be a declaration of his intention to rescind prior to the plea.

It seems to us clear, on principle, that a statement in a plea by the party from whom the property passed, that he claims back the property on the ground that he was induced to part with it by fraud, is as unequivocal a determination of his election to avoid the transaction as could well be made. Of course, if he had already determined his election the other way, or if such things had happened as precluded him from rescinding, the plea would have no effect; but after succeeding by means of such a plea, the person pleading it could never successfully set up the contract as still valid, either against the plaintiff in the action in which the plea was pleaded or any one else. He would have, both by act and by word, determined his election for ever according to the doctrine laid down in Com. Dig. Election, C. 1, 2. And no authority was cited on the argument, nor are we aware of any, for saying that this unequivocal expression of his determination of his election must be preceded by some act in pais. *Newnham* v. *Stevenson* (1) was much relied on by the plaintiff's counsel, but in reality decides nothing as to this point. The plaintiff there had obtained goods under a conveyance from one Saunders, made by him voluntarily and in contemplation of bankruptcy; and whilst they were in his possession and were his property, and before Saunders had become a bankrupt, the defendants wrongfully distrained on them. The Court of Common Pleas in their judgment say, "By a transfer which is a fraudulent preference the property vests in the transferee, subject to be divested by the assignees at their election, and the title of the transferee is perfect except so far as it is avoided by the assignees." So far this is unquestioned law. The Court then proceeds to deal with the evidence in the case before them: "The assignees in this case were not proved to have done anything to affect the plaintiff's title. They had not demanded the goods of the plaintiff. They had not even ratified the defendant's act. And the commencement of an action in trover, which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully, cannot without more be taken to be an election on the part of the assignees to

(1) 10 C. B. 713; 20 L. J. (C. P.) 111.

avoid the transfer." It is upon this latter sentence that Serjt. Simon relied; but we think it does not at all express an opinion that no statement, however explicit, on the record could amount to a determination of the election.

It is, however, quite true that no man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it; and therefore the London Pianoforte Company, on rescinding the contract, were bound to restore to Adams the money and the acceptance which they had obtained from him. Probably a Court of equity, if applied to for an injunction to prevent the plaintiff from continuing the action, would have made it a condition that the defendants should do equity by paying to the plaintiff whatever the plaintiff had paid to them under the contract; and probably, from analogy thereto, a Court of law would require the party pleading a plea of this sort to bring into court any money which the plaintiff had paid to them. It is not necessary to determine how that may be, for Adams was no party to this action, and the defendants could not be required, in this action between the plaintiff and themselves, to bring into court money which, in consequence of the rescission of the contract, they held for the use of Adams.

It may be that Adams in fact was only agent for the plaintiff, and that the money really belonged to the plaintiff; but that was not known to the defendants; and it does not lie in the plaintiff's mouth to object to the defendants' plea on the ground that they had not discovered the whole of his fraud.

Neither does it lie in the plaintiff's mouth to object to the plea because it does not contain a statement that they were ready and willing to return to Adams the money he had paid them; that being a matter affecting the rights of a stranger to the suit, but in no way affecting the rights of the plaintiff.

If, indeed, it could have been shewn that the bill had been negotiated so as to put it out of the power of the London Pianoforte Company to return it; or, still more, if it had been the fact that Adams was willing to receive back the money, and that they had refused, there would have been ground for saying that they had already determined their election by affirming the contract;

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but nothing of the kind existed in fact. The only ground on which the jury could have been asked to find that the London Pianoforte Company had affirmed the contract was, that they pleaded and relied on a plea of stoppage in transitu, which, if they could have proved it, would have entitled them to resume their vendor's lien for the unpaid balance of the price, without parting with the cash, and which was therefore so far inconsistent with a plea of rescission for fraud, the legal consequence of which would be that they could not retain the money.

But different and quite inconsistent defences may be and are raised every day in distinct pleas; and though the jury might perhaps have been asked, on this, to find that there had been an affirmance of the contract by holding to the money, it was the plaintiff's business to raise the point at the trial, and ask that it should be submitted to the jury. Probably, if the point was present to the minds of the plaintiff's counsel at the time of the trial, they abstained from raising it from a well-founded belief that the jury would have found nothing in favour of the plaintiff which they could reasonably find against him. Having abstained from raising it then, it is too late to do so now.

We think, therefore, that the plaintiff is not entitled to a new trial in order to have this point left to a jury. And as we think that the facts proved did constitute a defence, we think the rule should not have been made absolute, and that we should now discharge it, leaving the verdict to stand for the defendants.

Judgment reversed.

Attorneys for plaintiff: *Gregory & Co.*
Attorneys for defendants: *Pike & Son.*

END OF MICHAELMAS TERM, 1871.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXV VICTORIA.

HARRISON *v.* THE BANK OF AUSTRALASIA.

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Ship—Shipping—General Average—Spars used for Fuel.

The plaintiff's ship sailed from Melbourne for London, having on board (as is usual with sailing vessels on this voyage) a donkey-engine, which was equivalent to ten additional men, and without which (or the ten additional men) she would not have been seaworthy. The engine was used for pumping and also for other ship's purposes. The ship had on board a sufficient stock of coals for an ordinary voyage, and was expressly found to be seaworthy. On the 10th of March she encountered bad weather, which continued till the 1st of April, and then moderated. During this time she strained, and made much water, and she continued afterwards to leak; the water could only be kept under by pumping, and for this purpose it was necessary to use the engine, without which she could not have been kept afloat.

On the 16th of April the stock of coals was reduced to one and a half tons, and the captain, in order to obtain fuel, directed some spare spars and wood, which were part of the ship's stores, to be cut up to burn with the coal; wood alone would not have sufficed to get up the steam. On the 5th of May the ship obtained some coal from a passing vessel, and on the 16th put into port to obtain a further supply. On arriving in the Thames the engine broke down from overwork.

The ship was exposed to no serious risk from the water she made while there was sufficient fuel on board to work the engine.

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The plaintiff claimed from the defendants, who were owners of cargo, a general average contribution in respect of, 1. The spars and wood; 2. The extra coal; and, 3. The injury to the donkey-engine:—

Held, by Kelly, C.B., and Bramwell, B., that the facts shewed an imminent peril requiring the sacrifice of the spars and wood, and that the plaintiff was therefore entitled to a general average contribution in respect of them; but that he was not so entitled in respect of the coal or the injury to the donkey engine.

By Martin and Cleasby, BB., that no such emergency had occurred as to entitle the plaintiff to a general average contribution in respect of any of the above matters.

THIS was an action brought to recover the sum of 95*l.* 8*s.* 10*d.*, as a contribution in general average. The defendants paid 51*l.* 6*s.* into court, and the plaintiff denied that that sum was sufficient to satisfy the plaintiff's claim.

The action came on for trial at Guildhall on the 7th of July, 1869, before Kelly, C.B.; and a verdict was then entered for the plaintiff, subject to a special case, to be settled by an arbitrator, which stated as follows:—

In February, 1868, the defendants, who are bankers at Melbourne, in Australia, and in London, shipped on board the British sailing ship, *Champion of the Seas*, then lying at Melbourne, of which the plaintiff was owner, four boxes of gold to be conveyed to London.

5. The ship sailed on the 29th of February, being in every respect properly fitted and manned for the voyage, and having on board a sufficient quantity of coals for an ordinary voyage. (1)

6. The ship was furnished with a donkey-engine of eight-horse power, which was adapted for loading and discharging cargo, for hoisting sails and taking them in, and for pumping the ship. It was, according to the evidence of the captain, equivalent for the purpose of working the ship during the voyage to a crew of ten men; and, had the engine not been on board, the vessel would have required an additional crew of that number.

7. From the saving of labour and the reduction of the number of the crew effected by the use of a donkey-engine, it is sometimes called a steam crane.

8. It is usual for such a ship as the *Champion of the Seas*, on

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(1) In the course of the argument, in answer to a question by the Court on this point, the arbitrator stated that the ship was sea-worthy.

the voyage from Melbourne to England, to be furnished with a donkey-engine, which is used for pumping the ship when necessary.

9. From the 29th of February to the 10th of March, the ship experienced ordinary weather, and whatever pumping was necessary was done by the crew. On the 10th of March the ship encountered a severe cyclone followed by very bad weather, which caused her to strain and make much water. The water in the hold at times increased to five feet, and could only be kept down by constant pumping. At first the pumping was done by the engine during the day, and by the crew during the night; but it afterwards became necessary to keep the donkey-engine pumping constantly. With the donkey-engine the pumps were got to suck now and then.

10. After the 1st of April the weather moderated, but the vessel continued to leak; and about the 16th of April the supply of coals was reduced to about one and a half tons, from the constant working of the engine. It was necessary to keep the engine at work, and the captain, after consultation with the first and second officers, in order to obtain fuel, directed that some spare spars and wood which were part of the ship's stores and not intended to be used as fuel, should be cut up to use with the coal.

10A. There was no sudden emergency which rendered the cutting up of the spars and wood necessary; but it would have been impossible to have kept the ship afloat with the crew alone without working the donkey-engine.

11. Wood alone would not have sufficed to get up the steam necessary to work the engine; and the captain acted prudently and judiciously for the preservation of the ship and cargo in obtaining fuel by cutting up the spars and wood to use with the coals.

12. The fuel so procured was not sufficient to keep the engine at full work, and notwithstanding the efforts of the crew, who were occasionally assisted by some passengers in working the pumps, the water in the hold slowly increased.

13. On the 25th of April it was discovered that a butt under the port fore-channels, and six or seven feet below the water-line, had been started; whereupon the master of the ship lowered a boat and stopped it with grease, and on the 27th caused a stage to be

rigged, and by means of wedges and plugs succeeded in partially stopping the leak.

14. On the 5th of May the ship fell in with the bark *Peru*, and obtained from her thirty-three bags of coals; with this supply the engine was put to full work, and the water in the hold greatly reduced.

15. In order to procure a further supply of coals, the master determined to run into the port of Pernambuco, and the ship anchored at Pernambuco on the morning of the 16th of May.

16. The ship could not have been repaired at Pernambuco, and the captain having obtained a large supply of coals, viz., thirty tons, proceeded on the voyage. The captain in so doing acted prudently. The ship was exposed to no serious risk from the water she made, while there was sufficient fuel on board to work the donkey-engine.

17. The vessel continued to leak during the remainder of the voyage, and it was necessary to keep the engine constantly at work at the pump. When she arrived in the Thames the coals had been exhausted. Without the aid of the donkey-engine the vessel could not have continued the voyage.

18. The ship arrived at her place of discharge in the docks on the 6th of July. The engine broke down while she was coming up the river. The injury to the engine was the result of wear and tear from the constant working during the voyage.

The question for the opinion of the Court was, whether the cost of the coals purchased from the *Peru* and at Pernambuco, or the cutting up of spars and ship's materials for fuel for the donkey-engine, and the cost of the repairs of the donkey-engine, could be charged to general average, and recovered from the defendants.

If the Court should be of opinion in the affirmative, the case was to be referred back to the arbitrator to ascertain if the amount paid into court was or was not sufficient to cover the plaintiff's claim against the defendants. And if he should find that such sum was not sufficient, then judgment was to be entered for the plaintiff for the deficiency, together with costs of suit.

If the Court should be of opinion that none of the said items could be charged to general average, then the judgment was to be entered for the defendants, together with costs of suit.

April 28; May 31. (1) *Henry James, Q.C.* (*Cohen* with him), for the plaintiff. First, the plaintiff claims general average in respect of the spars and wood used as fuel to drive the donkey-engine. This expenditure answers to the description given by Blackburn, J., in *Wilson* v. *Bank of Victoria* (2); it is "expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature;" it is also within Lord Kenyon's words in *Birkley* v. *Presgrave* (3), "All those articles which are made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern;" and those of Lawrence, J., in the same case (4), "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo;" see also *Plummer* v. *Wildman* (5). This language agrees with the statements of text writers, both English and American: 2 Arn. on Mar. Ins. (3rd ed.) pp. 773, 780; Machlachlan on Shipping, p. 570; 2 Phil. on Mar. Ins. (3rd ed.), 83, p. 78, (ss. 1299, 1300). And the practice and opinion of average-staters is in conformity with it: Stevens on Average, p. 75; Bailey on Average, pp. 16, 17, 28, 99. The general principle which these authorities establish is, that any extraordinary sacrifice voluntarily and properly incurred for the common benefit of all, and to preserve ship and cargo from destruction, is matter for general average. Therefore, if the circumstances were such that without that sacrifice destruction was reasonably to be apprehended; or, in other words, if it would appear a necessary act to a reasonable and prudent man, it is matter for general average, notwithstanding there may have been no sudden emergency threatening immediate destruction. "The moment of the greatest distress cannot be waited for:" Benecke, p. 171. The plaintiff's claim answers these conditions. The necessity of the occasion is undeniable (see parr. 10–13); it was reasonably to be expected, and the result would in fact have been, that if the coals then remaining had been used up, the ship must have gone to the bottom. And it is equally clear

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(1) The case was twice argued, on the 28th of April before Martin and Bramwell, BB., and on the 31st of May before the full Court.

(2) Law Rep. 2 Q. B. at p. 213.

(3) 1 East, at p. 227.

(4) 1 East, at p. 228.

(5) 3 M. & S. 482.

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that the purpose to which the spars were applied was extraordinary. If the rudder being swept away, a spare mast were cut up to rig up a new one, this would be matter for general average: see 2 Arn. on Mar. Ins. (3rd ed.) p. 782; and the employment of spars to feed the fire is equally a diversion of them from their proper use, and therefore an outlay extraordinary in its character. The case may be tested by supposing that it became necessary to apply to this purpose timber forming part of the cargo; the master would clearly be entitled in such a case as the present to use the timber in that way, and the owner would equally be entitled to claim for general average; the shipowner sacrificing his own goods is in no different position, unless it can be shewn that the necessity for their use arose from some fault on his part. But it is here found as a fact, that when the vessel sailed she had an adequate supply of coals; the necessity, therefore, was one not to be foreseen, and which supervened in consequence of an unexpected and extraordinary peril.

Secondly, the plaintiff also claims in respect of the extra quantity of coals purchased for the donkey-engine. It is like the case of extra hands hired to pump, which would be allowed: *Wilson* v. *Bank of Victoria.* (1) The purpose was, "to preserve more subjects than one exposed to a common jeopardy;" and "an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away:" Blackburn, J., in *Kemp* v. *Halliday.* (2)

Thirdly, the injury to the donkey-engine was also the result of an extraordinary use of it in the preservation of ship and cargo; but this part of the plaintiff's claim, it must be admitted, is weaker than the rest. [He also cited *Lyon* v. *Mells* (3), *Grill* v. *General Iron Screw Collier Co.* (4), *Farnworth* v. *Hyde* (5), *Taylor* v. *Curtis.* (6)]

Pollock, Q.C. (*Lodge* with him), for the defendants. The opinions of average-staters, whose customs vary at different ports, are no evidence of the law on general average. Neither can American

(1) Law Rep. 2 Q. B. at p. 213.

(2) 6 B. & S. at p. 746; 34 L. J. (Q.B.) at p. 242. 11 Jur NS 852

(3) 5 East, 428.

(4) Law Rep. 1 C. P. 600. 12 Jur NS 572]

(5) 18 C. B. (N.S.) 835; 34 L. J. (C.P.) 207. 10 Jur N S. 349

(6) 6 Taunt. 608.

authorities be relied on, for it is well known that the American law goes further than the English in allowing contribution for general average: 1 Parsons on Shipping, p. 438 (n.); *Walthew* v. *Mavrojani.* (1) The last cited case also shews that *Plummer* v. *Wildman* (2) must be taken as limited by *Power* v. *Whitmore* (3), as had been before explained in *Hallett* v. *Wigram* (4); and what is said in *Birkley* v. *Presgrave* (5) must be taken with reference to these later decisions; indeed the point actually decided in that case was only that an action would lie for general average contribution, and there was no intention to lay down any rule as to what would give rise to such a claim. *Plummer* v. *Wildman* (2), however, does not assist the plaintiff, for it only allows the costs of going into a port to repair damage which is the result of a general average sacrifice; and, assuming such a sacrifice to have been made, the necessary consequence of it may very well be treated as part of the sacrifice itself. But here the whole question turns on whether there has been a voluntary sacrifice under such circumstances as to make it general average. The statements in the case shew that there has not. The circumstances must be such as will justify a jettison, which cannot be where the necessity is caused by the shipowner's default (1 Parsons on Shipping, p. 411). Here the donkey-engine was equivalent to ten men; and, but for it, the ship would have been undermanned, and, therefore, unseaworthy: *Clifford* v. *Hunter.* (6) But as the efficiency of the engine depends on there being sufficient fuel to keep it at work, the ship without sufficient fuel is as though it had neither the ten men nor any substitute for them, and the fault of the master in not having enough coal cannot entitle him to general average for burning spars. It is the shipowner's duty "to provide and do all that belongs to the proper navigation of the ship" (1 Parsons on Shipping, p. 382); and what has been done here has not gone beyond this duty. Again, there must be a sudden emergency, creating a peril which cannot be otherwise provided against. Here there was none such: see parr. 10 a. and 16.

The case is still clearer with respect to the extra coal; no dis-

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(1) Law Rep. 5 Ex. 116.

(2) 3 M. & S. 482.

(3) 4 M. & S. 141.

(4) 9 C. B. 580.

(5) 1 East, 220.

(6) Mood. & M. 103.

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tinction can be drawn between purchasing a fresh supply of coal and using coal already on board; carried, for instance, to supply a coaling station; and it cannot be contended that the latter would have been the subject of general average. *Wilson* v. *Bank of Victoria* (1) is directly against this claim. As to the claim for the donkey-engine, it would be as reasonable to claim the cost of repairs in general, which notoriously falls on the shipowner.

Cohen in reply. It is expressly found that the supply of coals was adequate, and that the ship was seaworthy; no fault, therefore, can be imputed to the shipowner (2), and the question turns only on whether the peril was of such a nature as to give rise to a claim for general average. It clearly was, unless it is essential that there should be an imminent peril of immediate destruction. But this is not the test, as is shewn by the instances where expenses incurred on account of ship and cargo, safe in port, but waiting for a convoy, or delayed by proceedings necessary to redeem the whole adventure from capture, are allowed as general average. There was here a moral certainty of total loss unless the measures actually taken were resorted to; for no change of circumstances could reasonably be anticipated which would have the effect of preventing it, and this is all that is required.

Cur. adv. vult.

Jan. 17. The Court being divided in opinion, the following judgments were delivered:—

MARTIN, B. This is an action in which the question is, whether the plaintiff is entitled to recover a sum of about 40*l.* for general average; and although the amount in dispute is not large, the question involves a matter of very great importance to the mercantile and shipping interests of this country.

The facts have been stated by an arbitrator in a special case. The first four paragraphs state the plaintiff is the owner of a ship called the *Champion of the Seas*, which in February, 1868, was at Melbourne, bound on a voyage to London, and that the defendants shipped on board four boxes of gold, for which the master signed the ordinary bill of lading.

The bill of lading is not set out, but it would state that the

(1) Law Rep. 2 Q. B. 203.

(2) See ante, p. 40, n.

defendants had shipped on board the four boxes of gold to be carried from Melbourne to London, and there delivered to the consignee upon payment of a certain ascertained sum for freight, unless prevented by the perils mentioned in the bill of lading. This is the only contract between the plaintiff and defendants, and it is clear that if the *Champion of the Seas* was the veriest sculk which ever sailed, and if she departed from Melbourne only half manned and utterly unseaworthy, nevertheless, if she had arrived in London, and the four boxes of gold had been there delivered to the consignee, the plaintiff would have performed his contract, and would be entitled to his freight. The defendants would have no legal ground of complaint that the ship was half rotten, that she was half manned, that instead of sailors she had a donkey-engine and a quantity of fuel utterly insufficient to work it for the voyage. The answer of the shipowner would be, "Your four boxes of gold have been safely delivered to you in London. I have performed my contract. The manner in which I have performed it is my business, not yours."

The real question in the present case is, whether the shipper (the merchant) is bound by law to pay to the shipowner, for the performance of the service contracted for in the bill of lading, a sum of money beyond that stipulated for in the written contract between the parties. [The learned judge here stated the effect of paragraphs 5–14 and the claims made by the plaintiff, stating the claim as to the donkey-engine to have been abandoned, and proceeded.] The question is, whether either of the above claims is general average, and I am of opinion that neither of them is. It seems, in reason, highly unjust that the merchant should be called upon to pay the two sums claimed. He had contracted with the shipowner to pay him a certain sum for the conveyance of his four boxes of gold from Melbourne to London. The shipowner was to provide the ship and seamen to perform the service, and he thought fit, instead of hiring ten additional men, to have a steam-engine, which, in order to its being of any use, necessarily required fuel. He did provide at Melbourne what he reasonably deemed sufficient, but it turned out he was in error, and that the supply was not sufficient. How, in reason, does this relieve him from the obligation of doing his best to remedy the short supply, and cast upon the merchant the obligation of contributing to the loss and expense which he incurred in consequence? There is no doubt, however, that long-continued custom has created the claim called "general average." This subject is treated in the 1st chapter of the 6th part of Abbott on Shipping, 11th ed., p. 521. It is said by Lord Tenterden to be founded on the "Lex Rhodia de Jactu," or, in other words, the law of Jettison, which is, that if for the sake of lightening the ship a jettison (jactura) is made of merchandise, that which is sacrificed for all should be made good by the contribution of all. His lordship comments upon it, and proceeds to state its true principle; that there must be a voluntary sacrifice for the good of all, and made at a moment of imminent danger, which he instances by the ship being in danger of perishing by a hurricane, or by the quantity of water that may have found its way into it, or by labouring upon a rock or a shallow upon which it may have been driven by a tempest, or when a pirate or enemy pursues, gains ground, and is ready to overtake; the loss arising from throwing merchandise overboard under such circumstances is to be made good by general average. He then proceeds to discuss cases, in which, in analogy to the law of Jettison, general average has been allowed; and as it seems to me, is rather disposed to think they have gone too far. The subject is discussed at great length by the learned editor in the notes, and I think he has, at the conclusion of note (n), p. 537, expressed the true rule, viz., that to make expenses incurred by the shipowner general average, they must be expenses voluntarily and successfully incurred, or the necessary consequence of a resolution voluntarily and successfully taken by a person in charge of a sea adventure, for the safety of ship and cargo, under the pressure of a danger of total loss or destruction imminent and common to them. In my opinion, in the present case there was no imminent danger of total loss when the spars and wood were cut up and burnt. The weather had moderated for the sixteen days previous, there was a ton and a half of coal remaining, which it was proper to husband, and the spars and wood were used to burn with the coal. There could clearly have been no jettison at the time, and, in my opinion, the shipowner must bear the loss of his timber being made use of to aid in making up for the deficient coal. For the same reason, I think the price of the coal bought on the 5th of May is not general average, and must be borne by the shipowner. In my opinion there was no present immediate peril imminent. The cases relied on on behalf of the plaintiff were *Birkley* v. *Presgrave* (1), and *Plummer* v. *Wildman* (2); these cases were said by the learned counsel for the defendants to be, although perhaps apparently in favour of the plaintiff, yet in reality not so; and he relied on *Power* v. *Whitmore* (3); *Hallett* v. *Wigram* (4), and *Wilson* v. *Bank of Victoria.* (5) In my opinion, the two cases last mentioned were correctly decided, and are accurate exponents of the law. In Mr. Arnould's book it is said (vol. ii., 3rd ed., p. 782), that where a rudder had been carried away and a spare spar was cut up to make one, it was decided to be general average. The circumstances of the case are not stated. I think the question in the present case is one of fact, and that the case does not shew that at the time when the spars and wood were cut up to add to the coal, or at the time when the coal was bought from the bark, there was such imminent danger of the ship's sinking that the loss and expenses incurred by the shipowner ought to be contributed to by the merchant.

I think that in reason, and in accordance with his contract, he ought to bear the loss and expense himself.

This judgment was read by

CLEASBY, B., who then added:—

I have read the judgment which my Brother Martin has written, and I agree in that judgment.

I will only add two remarks. First: I think the statement in the case does not afford sufficient materials for the conclusion that any sacrifice was made at a time of imminent danger. The captain would not have been justified in making a jettison of a portion of the cargo to diminish the leak, and so lessen the necessity for continuous use of the donkey. It was a proper and prudent thing in the captain to guard against the supply of fuel failing, and the possibility of his being unable to get a further supply in time. But this prudence is not sufficient to justify a jettison or any other

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(1) 1 East, 220.

(2) 3 M. & S. 482.

(3) 4 M. & S. 141.

(4) 9 C. B. 580.

(5) Law Rep. 2 Q. B. 203.

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sacrifice, so as to lay a foundation for general average. It does not appear upon the case how long the coal would have lasted after the 16th of April, when the captain began to use the spars; nor how much remained at the time when the fresh supply was obtained; but it does appear the spars were only used to eke out the coal, and that they lasted from the 16th of April to the 5th of May.

The danger in reality was not of going to the bottom if nothing was done, but the improbability of meeting with a supply of fuel during the interval while the existing fuel was being consumed. And it appears to me that this not only is insufficient to establish such a case of imminent peril as is necessary to found a claim to general average, but negatives it.

The other remark is, that some difficulty is created in this case by referring to American authorities on this subject, and to Stevens on Average, and other works of a similar nature. The law in America does not in all respects agree with ours on the subject of general average (as will be pointed out shortly), and the other works referred to do not, in my opinion, correctly state the English law on the subject. We were pressed with many authorities to shew that imminency of danger was not necessary to make the expenses incurred by a vessel in going into port to repair a subject of general average. It is undoubted that when some sacrifice has been made (for example, cutting away masts, &c.), the expenses consequent upon going into port after the danger is over to repair this loss are in England the subject of general average; because going into port, though there is no imminent danger at the time, yet being rendered necessary by the sacrifice made in imminent danger, stands upon the same footing as the sacrifice itself. But the expenses attending the going into port to repair sea damage caused by a storm when no sacrifice has been voluntarily made, do not, it is submitted, form items of general average according to English law, although they are regarded as doing so in America: 3 Kent's Commentaries (10th ed.), p. 329, and note. The distinction is clearly pointed out in the judgment in *Power* v. *Whitmore*. (1) The case of *Plummer* v. *Wildman* (2), relied upon by the plaintiff, might appear to countenance the opinion

(1) 4 M. & S. at p. 149.

(2) 3 M. & S. 482.

that the expenses consequent upon putting into port to repair sea damage for the benefit of all, went into general average; but that case must always be taken with the explanation given by Lord Ellenborough in *Power* v. *Whitmore* (1), in the following year. He was the judge who presided when both cases were decided, and in the latter case he points out that in *Plummer* v. *Wildman* (2) the master had cut away the rigging in order to preserve the ship, and afterwards put into port to repair that which he voluntarily sacrificed for the benefit of all.

Now, according to par. 6, the donkey-engine and coals were a part of the regular equipment of the ship, and used for loading and unloading cargo, hoisting sails, and taking them in, and pumping the ship. If from the unexpected length of the voyage, and tempestuous weather causing the vessel to strain and leak, and so making pumping indispensable for the safety of the ship, the supply of coals ran short, and the ship made for the nearest coal depôt to provide a further supply, without which the voyage could not be prosecuted with safety, could the expense of providing this further supply go into general average? Would it not fall upon the owners as part of the necessary expenses of navigating the ship?

Or, again, if from excessive use in any of the purposes for which the donkey-engine was used, it broke down, and it was necessary to go into port to repair it, would the expense of going into port fall into general average? In those States in America in which it has been held that the expenses of going into port to repair damage from tempest are matter for general average this might be so, but it is submitted it would not be so here.

Or suppose that there were no means of repairing the damage to the engine in the case last put, and therefore, instead of the engine and coals, the captain ships an equivalent crew of ten men (see par. 6) could this expense go into general average?

It is hardly necessary to point out the distinction between the several cases last put, and a case put in the argument, viz., that if a vessel with a full and complete crew were unable to keep down a leak, so that if nothing further were done the ship would go to the bottom, then the expenses of sending ashore and getting additional hands, or it may be a donkey-engine, to keep down the leak, would go into general average. In that case the emergency would be urgent and imminent, and the emergency would not be caused by the having coals on board which are consumed by being used, instead of a crew which is not so consumed.

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(1) 4 M. & S. at p. 149.

(2) 3 M. & S. 482.

KELLY, C.B., delivered the judgment of himself and Bramwell, B. It seems to us that this is a case of general average. The ship was well found seaworthy, and with a proper quantity of coal for the donkey-engine. She sprung a leak, and through it must, if the donkey-engine ceased to work, have foundered in a few days or hours, unless some relief not to be foreseen or calculated on had arrived. The arbitrator finds that she had coal for a few hours only; that had she burned her coal, wood would not have sufficed to keep up the fires, but that by combining coal and wood the fires could be kept up for a much longer time. Accordingly the captain prudently and properly sacrificed some spare spars, and saved the ship and cargo. There seem to us here all the ingredients of a case of general average. Peril of the seas imminent, certain loss in a short time unless something not to be anticipated should intervene, and a sacrifice of the property of one for the benefit of all. Suppose the wood had been cargo, and the captain had burned it, would it have been a wrongful act in the captain? would not the owner have had a good claim for general average? would not the captain have failed in his duty unless he had burned these spars, whether the property of his owner or cargo? Suppose the donkey-engine had been cargo, and had been fitted up on the springing of the leak, and the wood burned as now. It is said the danger was not imminent, that there was no emergency. We think there was, and that a certainty of destruction within a short time unless prevented is an emergency and imminent. Suppose a vessel ran for shelter into a river where no supplies could be obtained; suppose she would have to stay a fortnight unless she got out at the then spring tides; suppose her provisions would fail her in that time; suppose, to get out, she lightens herself by throwing some heavy cargo overboard; would not that be a case of emergency and imminent danger? We think it would, and that such is the result of all the authorities, some of which may now be briefly considered.

A general average has been defined to be "a loss arising out of extraordinary sacrifices made or extraordinary expenses incurred for the joint benefit of ship and cargo;" per Lawrence, J., in *Birkley* v. *Presgrave* (1). *Wilson* v. *Bank of Victoria* (2), cited on behalf of the defendants, only shews that where steam power is substituted for sailing power, which from injury to the ship had been exhausted, the additional expense of fuel is not to be deemed an extraordinary expense within the meaning of the rule. But the present case is not one of substitution at all. It was necessary, in order to keep the ship afloat, that additional fuel should be found. The coals on board by themselves would have been insufficient, and to feed the fires a number of spars, the property of the shipowners, and part of the ship's stores, were cut up and used in addition to the coals as fuel. This was, we think, an extraordinary sacrifice, and necessary, as may be fairly inferred from the statements in the case, to save the ship from sinking. In principle this seems to be within the case of *Plummer* v. *Wildman* (3), where part of the rigging of the ship was cut away, and the expenses of returning to port to repair the damage, without which the ship could not have prosecuted her voyage or safely kept the sea, were held to be the subject of general average. This case is supposed to have been shaken by the case of *Power* v. *Whitmore* (4), decided shortly afterwards; and so in *Hallett* v. *Wigram* (5), where a part of the cargo had been sold to raise money at a port to which the ship had put back for the repair of damages incurred by the ordinary perils of the sea, it was held to be no case of general average; but the true principle, as applicable to these cases, is well stated in Abbot on Shipping, p. 497 (referred to in 9 C. B. 603) in these terms: "It seems to result from these decisions, that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages, and provisions during the stay, are to be con-

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(1) 1 East, at p. 228.

(2) Law Rep. 2 Q. B. 203.

(3) 3 M. & S. 482.

(4) 4 M. & S. 141.

(5) 9 C. B. 580.

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sidered as general average; but if the damage was incurred by mere violence of wind and weather, without sacrifice on the part of the owner for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner to keep his vessel tight, staunch, and strong during the voyage for which she is hired." The late case of *Kemp* v. *Halliday* (1), in the Exchequer Chamber, is in strict conformity with the doctrine there laid down by Lord Tenterden.

Upon these grounds we are of opinion that, as regards the spars cut up and the ship's materials used for fuel, this is a case of general average; but not so the cost of the coal obtained from the *Peru*, or purchased at Pernambuco, or of the repairs of the donkey-engine. Upon this point, therefore, we think the plaintiff entitled to the judgment of the Court, and that the case must be referred back to the arbitrator.

The Court being equally divided, Cleasby, B., withdrew his judgment, and the Court gave

Judgment for the plaintiff, the case to be remitted to the arbitrator to assess the general average contribution in respect of the spars and wood.

Attorneys for plaintiff: *Westall & Roberts.*
Attorneys for defendants: *Walton & Bubb.*

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(1) Law Rep. 1 Q. B. 520.

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Landlord and Tenant—Trespass—Delivery of Possession by Order of the County Court under 19 *&* 20 *Vict. c.* 108, *ss.* 50, 51.

An order for delivery of possession made by the County Court under 19 & 20 Vict. c. 108, s. 50, does not affect the rights of a person not a party to the proceedings; and,

Semble, it does not affect the rights of the person against whom it is made:—

Held, therefore (by Channell and Pigott, BB., Martin, B., dissenting), that the defendant, who had obtained such an order in a proceeding against one Usher, his tenant, was liable to an action of trespass brought by the plaintiff, who was tenant to Usher.

Action of trespass tried before Martin, B., at the Westmoreland Spring Assizes, 1871.

It appeared upon the trial that Walker, the defendant, had in 1852 let certain sheds adjoining the Red Lion Hotel, at Grasmere, to one Usher as yearly tenant at 1*s.* rent. He had determined the tenancy by notice to quit, and had in April, 1870, issued a summons from the Westmoreland county court against Usher to recover possession of the premises and for arrears of rent under 19 & 20 Vict. c. 108, ss. 50, 51. On the 19th of May Walker obtained judgment, and an order was made that Usher should give up possession in fourteen days. The order was not obeyed, and on the 4th of June a warrant was issued by the county court to the high bailiff directing him to give possession to Walker, and to levy for the rent in arrear and costs. (1) On the 6th of June the high bailiff proceeded to execute the warrant: but being resisted by Usher was unable then to give possession to Walker. On the 22nd of June the high bailiff again went to the premises accompanied by two policemen and Walker, and meeting with no resistance, executed the warrant by emptying the sheds, and putting Walker in possession.

The plaintiff was in occupation of the Red Lion and the sheds under a demise from Usher, but was no party to the proceedings in the county court; 19 & 20 Vict. c. 108, making no provision for bringing before the Court any other person than the tenant against

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(1) See the form in Davis's County Courts, p. 403.

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whom the summons is issued. He now brought this action in respect of the defendant's acts in taking and keeping possession.

The learned judge held that the acts of the defendant were protected by the order of the county court, that the execution of the warrant by the high bailiff had changed the possession, and that ejectment was the only remedy; and he directed a verdict for the defendant. A rule for a new trial on the ground of misdirection having been obtained,

May 22. *Holker, Q.C.,* and *Campbell Foster,* shewed cause. The defendant has obtained legal possession of the premises under the direct words of 19 & 20 Vict. c. 108, s. 50, and the order of the county court. The section provides that if the order made upon the defendant to give up possession is not obeyed, "the registrar, whether such order can be proved to have been served or not, shall, at the instance of the plaintiff, issue a warrant authorizing and requiring the high bailiff of the court to give possession of such premises to the plaintiff." The section contemplates a possession by a third person, and provides for the issuing of the summons against such person in possession instead of the tenant at the option of the plaintiff. It is clear, therefore, that the effect of 9 & 10 Vict. c. 95, s. 58, is so far modified, both as against the tenant and any third person in possession, that by the operation of the order and warrant, and the execution of the warrant, the legal possession is changed. To maintain the contrary it must be said that when the high bailiff affects to give possession to the plaintiff under the express directions of a statute, he does not give legal possession, or, in fact, does not give possession at all, since there cannot be two inconsistent possessions of the same thing. But the plaintiff in this action was not, in fact, a stranger to the proceedings in the county court; he was in as tenant to Usher, and could have no greater right against the now plaintiff than Usher had, and is concluded by the proceedings against his landlord: 2 Smith's Leading Cases, 706 (6th ed.); *Outram* v. *Morewood.* (1) In *Campbell* v. *Loader* (2) the defendant in the action for trespass and mesne profits was actually a party to the proceedings in the county court; but it was held that the order did not conclude him in an action

(1) 3 East, 346, at p. 353.

(2) 3 H. & C. 520; 34 L. J. (Ex.) 50.

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for mesne profits, because the county court could not have tried it. But here that reason does not apply, for the whole matter was within the jurisdiction of the county court. Sect. 122 of 9 & 10 Vict. c. 95, contained an express proviso that the order should not protect the person obtaining it from an action of trespass; the omission of that proviso in the present Act shews that it was not intended that that liability should continue.

Quain, Q.C., and *Trevelyan*, supported the rule. No possession was in fact given by the high baliff to the defendant, if the title was in the plaintiff, in whom also the possession then was. This is clear, if the words under which the high bailiff acted are read in connection with the rest of the section, and with the previous legislation. By 1 & 2 Vict. c. 74, s. 1, provision was made for the recovery by landlords of the possession of small tenements by proceedings before justices; and when the county courts were established by 9 & 10 Vict. c. 95, a similar jurisdiction (but up to larger amount of rent) was given to them, in almost identical terms, by s. 122 of that Act. In both sections it was provided, that nothing therein contained should be deemed to protect the person making the application, or suing out the warrant, from any action by the tenant or occupier in respect of such taking possession, where such person had not lawful right to the possession of the premises. A fortiori no other person was bound by what was done; and this is shewn by the special protection given to the persons executing the warrant by s. 124. The effect, therefore, was only to give to the landlord the possession which the tenant, or the person in actual occupation, against whom the landlord proceeded, had; but not to bar the right even of those persons, nor to affect in any way the right of third persons; and s. 58, which withdrew questions of title from the jurisdiction of the county court shews that this was the intention. By 19 & 20 Vict. c. 108, the 122nd section of 9 & 10 Vict. c. 95, was repealed, and s. 50 was substituted for it, which omits the proviso. But the omitted proviso related only to actions by the person who was party to the proceeding, leaving him to the operation of 9 & 10 Vict. c. 95, s. 89, and the omission therefore can have no effect on the position of strangers; and accordingly s. 60 again provides the same protection. Now if under s. 50 the landlord proceeds against the

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person in actual possession, but who is not his tenant, there is a provision in s. 53 by which the tenant is to receive notice, and may become a party to the proceeding, but where, as here, the landlord proceeds against the tenant, there is no means by which the person in actual possession can come in, nor any provision made for his even receiving notice. He is therefore in every respect a stranger to the proceedings, and his rights, amongst which his legal possession is one of the most important, remain unaffected. This is further shewn by the frame of s. 50, under which an order is in the first instance to be made on the tenant proceeded against to give up possession; and it is only on his making default that the bailiff is to be directed to give possession; which shews that the bailiff is only to give such possession as the tenant could have given himself. If the contrary construction were adopted the effect might be that by means of a proceeding to which the person in possession was no party, and in which he had no power to intervene, he might be put to his action of ejectment, and the whole legal rights of the parties changed. *Banks* v. *Rebbeck* (1), decided under the corresponding section of the earlier Act (9 & 10 Vict. c. 95, s. 122), shews that the jurisdiction of the county court extends only to cases where the relation of landlord and tenant exists; and the defendant is therefore at liberty to shew that no such relation existed, and that the proceedings were coram non judice: *Coneys* v. *Coneys* (2); *Marshalsea Case* (3); *Annesley* v. *Dixon*. (4)

Cur. adv. vult.

Jan. 23. The Court being divided in opinion, the following judgments were delivered:—

PIGOTT, B. This was an action of trespass brought by the plaintiff for turning him out of possession of a shed under a warrant of the county court.

The present defendant had procured it to be issued, and at the trial my Brother Martin nonsuited the plaintiff, being of opinion that, although he might have questioned the title to the shed in an ejectment, he could not maintain trespass for what was done under the warrant, which was authorized by the joint effect of the statutes 9 & 10 Vict. c. 95, and 19 & 20 Vict. c. 108. A rule was obtained to set aside the nonsuit and for a new trial.

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(1) 20 L. J. (Q.B.) 476.

(2) 8 Ir. Com. L. Rep. 379.

(3) 10 Co. 68, b.

(4) Ld. Holt, 372, 377, 382.

The question whether the nonsuit was right depends on the construction of those sections of the above-mentioned statutes which relate to the obtaining possession by the landlord of small tenements, and especially of the 50th section of the later Act.

The facts of the case are set forth at length in the judgment of my Brother Martin, and I adopt them for the purpose of my judgment. It appears from them that the county court proceedings were between the present defendant and one Usher, and that the present plaintiff, who had originally come into possession of the shed under Usher, was not a party to them, and (as it is said), had no knowledge of the proceedings, or of the defendant's title to the premises. But I think it highly probable that had the case gone on the defendant would have been entitled to the verdict, and that the real justice of the case has been arrived at. Still the point that we have to determine is, whether it was competent for the plaintiff to question the validity of the county court proceedings, and of the warrant, and to try the defendant's lawful right (which he proposed to do) in this action of trespass. I am of opinion that it clearly was.

The argument mainly turned upon the change of language in the 50th section of the later statute, and the omission in it, or elsewhere in the statute, of that proviso which was to be found in the 122nd section of 9 & 10 Vict. c. 95, the first County Court Act; for it could not be denied, that if the section containing that proviso had not been repealed, it would have been competent to try whether the person suing out the warrant had lawful right in any form of action that was applicable.

The proviso was to the effect, that there should be no protection for the person by whom the warrant should be sued out against any action brought by any tenant or occupier in respect of such taking possession, where such person had not lawful right to the possession. It was said that this was an authority to sue in trespass where there was no lawful right to possession under the warrant, and that, as the proviso was repealed, the legislature thereby shewed an intention to take away the possessory action of trespass.

But it seems to me that there are several answers to this argument; and one is that the proviso (from its very expressions) was not intended as an authority at all to sue in trespass or otherwise, but as a caution or proviso that the Act was not to be taken as a protection against actions for the entry, though under the process of the county court, except in those cases where there was lawful right to the possession. That it was, in fact, introduced ex majori cautelâ, to assist in the construction of these provisions for recovering possession of tenements in the then newly instituted county court tribunals, as it had previously been into the statute which first gave a similar jurisdiction to justices.

It seems to me, however, that this proviso was really unnecessary; for I agree in my Brother Channell's view, that the original County Court Act, in conferring the power to give possession of small tenements, must be taken to be confined (as its language imports) to cases where the landlord has a lawful right to the possession; and, consequently, if a warrant were procured and possession taken without lawful right to the possession, such proceeding would be without jurisdiction altogether and actionable, and the parties to it could only be protected by the clearly expressed intention of the legislature. This is done still as to the officers of the court, but not as to the parties; and it follows that the latter in such a case must be liable to an action of trespass.

It cannot be contended that the decision of the county court judge is to be held conclusive upon the subject of his own jurisdiction, a power which has never been conceded at common law, so far as I am aware, to any inferior tribunal.

The result at which I arrive from the consideration of the statutes is, that the legislature only intended to give the right to recover possession under the warrant of the county court where there was a lawful right to it, and it has not expressly or by implication shewn any intention to preclude this question being raised in a superior court by action of trespass.

This is what the plaintiff here was desirous of trying, and I think was entitled to do. And this rule, therefore, ought to be made absolute for a new trial.

CHANNELL, B. This was an action of trespass tried before my

Brother Martin, and the facts proved at the trial are set out in his judgment. It is only necessary for me to add to his statement of the facts that the plaintiff proposed at the trial to shew that the present defendant was not really entitled to the shed as against himself, the plaintiff, and that the learned judge ruled that he could not do so, and that the proceedings in the county court were conclusive upon this point. I am of opinion that these proceedings were not conclusive, and that it was open to the plaintiff to dispute the right of the defendant. Whether the proceedings in the county court were evidence against the plaintiff of the defendant's title is a question which it is not necessary to determine. They would of course be admissible in evidence against Usher, and there is no doubt that the plaintiff claims through Usher. There is, however, the authority of Mr. Justice Littledale, in *Doe* v. *Earl of Derby* (1), for saying that a verdict which is evidence against A., is not admissible against B., on the ground that B. claims under A., unless B. claims under A. by a title subsequent in date to the verdict. If this be so, the proceedings in the county court between the defendant and Usher, to which the plaintiff was not a party, and which were subsequent in date to the title which the plaintiff had acquired under Usher, would not even be evidence against the plaintiff, unless there is something in the County Court Acts to make them so. I do not see anything of the kind, but I do not think it necessary to determine this, because I am satisfied that even if they were evidence they were not conclusive evidence.

It seems to me that the provisions as to the recovery of small tenements in the Act under which these proceedings were taken (19 & 20 Vict. c. 108), have substantially the same effect as the similar provisions in the previous County Court Act, and in the Act 1 & 2 Vict. c. 74, conferring a similar jurisdiction on magistrates; and that at all events they have no greater effect as against persons not parties to the proceedings, as was the case with the present plaintiff. The effect of proceedings under the former Act is clear, and is that they protect the officers of the court acting under them, whether the person setting the court in motion has any real right or not. They also protect a landlord who has a lawful right of entry upon premises which are being held over against him after the expiration or determination of a tenancy, and who, if able to enter and take possession peaceably, without having recourse to any process of law, could not be treated as a trespasser, but who practically cannot venture to attempt to do so, and requires assistance from the law to protect him from the risk of being held liable either for a forcible entry or for provoking a breach of the peace. By the express words of s. 122 of 9 & 10 Vict. c. 95, it is provided that a person not having a lawful right to the possession of the premises is not to be protected by suing out a warrant, and no doubt could have arisen in the present case if that provision had remained in force. The contention on behalf of the defendant, however, is founded mainly upon the different wording of the subsequent Act, 19 & 20 Vict. c. 108; and it is argued that the repeal of the provision to which I have just referred of the former Act, shews that the order of the Court under the subsequent Act may protect a person suing it out without having a lawful right to the possession of the premises. Now, as to this, it is clear that the order can be no protection where made without jurisdiction; and, on looking at the introductory part of the section, both in the former and the present Act, it will be seen that the jurisdiction is only conferred in cases where the landlord has a lawful right to the possession. Therefore, any order made in favour of a person not having such a lawful right, would be an order made without jurisdiction, and no protection to any one except those whom the Acts expressly declare shall be protected, that is to say, only to the officers of the court. It follows, therefore, that the words in the former Act, to the effect that persons not having lawful right should not be deemed protected, were only inserted ex abundanti cautelâ, and their omission in the subsequent Act does not alter the construction. An argument is also drawn from the repeal of the 126th section of the former Act, which enacted that the suing out of such a warrant by a person not having a lawful right should be deemed a trespass before entry, and that by certain proceedings something similar to a replevin, all actions on the warrant might be stayed until the determination of an action for this trespass. It seems to me, however, that the reason why this section was repealed by 19 & 20 Vict. c. 108, may have been that by s. 68 of that Act an appeal was for the first time given in case of proceedings for recovery of tenements, and that it was thought that this would provide sufficient means for staying proceedings under the warrant.

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(1) 1 Ad. & E. at p. 790.

It is, of course, important to remember in construing these Acts that the county court had no jurisdiction to try title, and it has repeatedly been held that a bonâ fide claim of title ousted the jurisdiction both under 9 & 10 Vict. c. 95, and 19 & 20 Vict. c. 108. There has been, so far as I am aware, no decision that proceedings under any of these sections are conclusive as to the right to possession, and *Campbell* v. *Loader* (1) seems a decision that they are not. I think, therefore, that there is very strong ground for saying that even as against Usher these proceedings would not have been conclusive, and that he might, in any subsequent action, have set up that the present defendant, Walker, had, at the time of obtaining the order and warrant, no right to possession of the premises, for this would really be nothing more than setting up that the order was made without jurisdiction, which he might clearly do. Supposing, however, that the proceedings were conclusive against Usher, it can only be by reason of the order being made against him in a proceeding to which he was a party; it must be held, in fact, that the true construction of the 50th section is, that power being given to the judge to make an order upon proof of the facts giving him jurisdiction, he has thus conferred upon him power to decide whether he has jurisdiction or not. This would be somewhat anomalous; but even if he has power to decide whether he has jurisdiction or not, at most his decision on the point can only be binding on the parties to the proceeding in which it is given, or on persons claiming under them, by a title subsequently acquired. The landlord may, "at his option," enter a plaint either against the tenant or against any person claiming under him and refusing to give up possession; but it is only the person against whom he elects to proceed who is "defendant" in the proceedings, and it is only against the "defendant" that an order can be made, although, if the order is disobeyed, a warrant may issue under which possession of the premises may be obtained whether the "defendant" is at the time in possession of them or not. It would not be contended, I presume, that this warrant would be conclusive against a person in possession who really did

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(1) 3 H. & C. 520; 34 L. J. (Ex.) 50. 11 Jur NS 286

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not claim at all under the tenant against whom the proceedings had been taken. Yet, if it is not conclusive against such a person, it is difficult to see why it should be conclusive against any one who does claim under the tenant, because whether the person in possession claims under the tenant or not is not one of the matters as to which proof must be given before the judge.

It is, of course, most improbable that the legislature should enact that a man should be turned out of possession under proceedings to which he was not a party and of which he had no notice, and that when so turned out he should be bound by the proceedings and not able to dispute the title of the person who had set them in motion. With regard to the words "at his option," they seem to be introduced, not so much to relieve the landlord from the necessity of proceeding against the person in possession (as suggested by my Brother Martin), as to enable him to go against the tenant, which, under the former Act, he could only do when the tenant was in possession of at least part of the premises. The legislature has certainly said that the landlord may go against the tenant without going against the person in actual possession; but it has not said by so doing he shall be able to get an order which is to be conclusive against the person against whom he so elects not to proceed. I have said that I am not satisfied that the proceedings are conclusive in any case; but, at all events, I am satisfied that where, as in the present case, the landlord elects to proceed against the tenant only, the warrant which he obtains is only of the same use to him as a warrant under the former Act, and that is as means of getting possession peaceably, and I think when he has so obtained possession he is as liable to an action of trespass as if he had obtained possession in any other manner, that is to say, he is liable if he has not in fact a right to the possession, and is not liable if he has.

This being my opinion of the statute, it follows that in the present case there should be a new trial, because, although it seems very probable from the facts proved, that the defendant really had a right to the possession of this shed, yet the county court proceedings did not, in my judgment, prevent the plaintiff from contesting this right, and the learned judge was wrong in holding that he could not contest it.

MARTIN, B. This is an action of trespass to a shed, tried before me at the last Appleby Spring Assizes. The trespasses alleged were twofold: First, the taking possession of a shed which was formerly two buildings, under a warrant of the county court of Westmoreland. Secondly, the continuing in possession afterwards up to the time of action brought. The shed adjoined the Red Lion Inn, at Grasmere, and its origin appeared from an agreement which was put in evidence dated the 14th of February, 1852. This agreement was made between defendant of the first part, Isaac Usher of the second part, and William Coates of the third part, and recited that the defendant was the owner of a parcel of land adjoining the Red Lion Inn, which some time before was in possession of Coates, who erected a building upon the land of the defendant by the leave and licence of one Copperthwaite, the then owner of the property, which building had been in the possession of Usher for three years, and that Usher was desirous of making a further erection on the same piece of land; which the defendant agreed to on Usher's paying 1*s*. a year on the 14th of February in each year, as a precaution against any person claiming a right through occupancy; and Usher agreed to pay the rent. The shed in question was the original building and an addition subsequently made to it. On the 5th of November, 1852, Usher by deed demised the Red Lion to plaintiff for nine years, at a rent of 75*l*., and it is to be taken that this lease included the shed. He continued in occupation until the 22nd of June, 1870, as tenant to Usher, upon which day he was turned out of possession by the high bailiff of the county court under the warrant before mentioned. He stated at the trial that he knew nothing whatever of the title of the defendant, or of the proceedings in the county court hereafter mentioned, and for the present purpose this is to be taken to be true.

In March, 1857, the defendant sued Usher in the county court of Westmoreland upon the agreement of the 14th of February, 1852, for five years rent of the shed, and recovered judgment for the rent 5*s*., and 12*s*. 10*d*. costs, 17*s*. 10*d*. in all, which was paid by Usher. In August, 1869, the defendant served Usher with a notice to quit, and in April, 1870, proceeded by plaint against him in the county court, under 19 & 20 Vict. c. 108, s. 50, to obtain possession of the shed. On the 19th of May the matter was heard, and the Court made an order that Usher should deliver up possession of the shed to the defendant within fourteen days. This order was not obeyed, and a warrant was issued to the high bailiff, dated 19th May, to deliver possession to the defendant. The bailiff did so; and the question is, whether the plaintiff can maintain an action of trespass against the defendant; first, for aiding the bailiff in taking possession, or secondly, for continuing in possession afterwards. There was conflicting evidence as to whether the defendant took any part in taking possession of the shed, but in my view of the case this is immaterial.

The first question depends entirely upon the true construction of 19 & 20 Vict. c. 108, s. 50. The second upon the common law principles as regards the action of trespass. The 122nd section to the 127th inclusive of 9 & 10 Vict. c. 95 (the original County Court Act) are clearly in analogy to 1 & 2 Vict. c. 74. This was an Act to facilitate the recovery of possession of tenements after due determination of the tenancy. The jurisdiction was there given to the justices of the peace, and the persons against whom the proceedings were to be taken were the tenant, or if he did not occupy the premises or occupied only a part of them, every person by whom the same or any part thereof should be then actually occupied; and there was a provision that nothing in the Act should protect the person on whose application the warrant should be granted from any action to be brought against him by the tenant or occupier in respect of such entry and taking possession, when such person had not lawful right to the possession; but the justices and constable were protected by the 5th section. It is therefore perfectly clear that the scope and object of this Act was merely to change the possession and leave the title entirely untouched.

The 9 & 10 Vict. c. 95 (ss. 122 to 127 inclusive), confers a similar jurisdiction upon the county courts, and the persons to be proceeded against are the tenant, or, if the tenant does not actually occupy the premises, or occupy only a part thereof, any person by whom the same or any part thereof shall be then actually occupied (the same words which are in 1 & 2 Vict. c. 74, s. 1); and there is the same provision rendering the person suing out the warrant liable to an action for the entry and taking possession, if he had not lawful right. These sections are in substance the same with 1 & 2 Vict. c. 74, substituting the county court for two justices.

The 19 & 20 Vict. c. 108, is an Act to amend the County Courts Act, and upon it the first of the questions in the present case depends. It repeals ss. 122, 123, 126, and 127 of 9 & 10 Vict. c. 95, retaining ss. 124–125.

The 124th is the section protecting the judge and officers of the courts, and s. 125 protects the landlord in respect of an irregularity or informality. Neither of these sections have any bearing upon the present question. The sections substituted in lieu of the repealed sections are the 50th and some following sections. The 50th enacts that when the term and interest of the tenant of premises under a certain value shall have expired or been determined by a notice to quit, and such tenant, or any person holding or claiming by, through, or under him, shall neglect and refuse to deliver up possession, the landlord may enter a plaint at his option, either against the tenant or against the person so neglecting or refusing, for the recovery of the premises, and thereupon a summons shall issue against such tenant, or such person so neglecting or refusing; and upon certain proof being given, the judge may order that possession of the premises be given by the defendant to the plaintiff, either forthwith, or upon a certain day; and if such order be not obeyed, the registrar shall, at the instance of the plaintiff, issue a warrant authorizing and requiring the high bailiff to give possession of the premises to the plaintiff. The provision rendering the plaintiff or landlord liable to an action for the entry for executing the warrant is not re-enacted. Now, construing this section with the aid of the repealed section, it seems to me clear that the legislature have designedly and of intention altered the proceedings. The former statute directed that the proceedings should be taken against the person in actual possession, and no person could be lawfully ejected under the warrant except a person in possession named in the proceeding. But the present section is entirely different. It contemplates two separate persons, the tenant and a person in possession claiming through or under him. This was the relation which existed between Usher and the plaintiff. Usher was the tenant, and the plaintiff a person claiming under him, and the 50th section expressly enacts that the landlord may at his option enter the plaint either against the one or the other, and that thereupon the summons may issue against whichever of these persons he at his option may have selected. The legislature probably contemplated the ordinary case of a small holding occupied by a sub-tenant, perhaps a labourer, and desired to relieve the landlord from the necessity of proceeding against such a person. The argument on the other side is founded upon the alleged injustice of turning a man out of possession by process of law who has had no opportunity of defending himself and being heard against it; however this may be, it seems to me clear that the legislature has so enacted, and to hold otherwise would defeat the enactment. The sole and only object of all these statutes was and is to evict the person in possessson, and to give the possession to the landlord. They do not in the least interfere with or affect the title, or conclude any one. The 50th section in distinct words gives the landlord the option of proceeding against the tenant or against the person holding by, through, or under him, and if he, having elected to proceed against the tenant, cannot under the warrant eject the person holding possession under him, the proceeding is absolutely of no avail whatever.

It seems to me, also, that the succeeding sections tend to shew that the above is the true construction of the 50th section. The 51st section provides for a plaint against the tenant only. The 52nd section gives a remedy to obtain possession for non-payment of rent. Again, the plaint is against the tenant only, and under it, by the express words of the section, not only he, but all persons claiming by, through, or under him may be evicted, and are barred from all relief in equity or otherwise. This section does by express enactments the very thing which it is alleged cannot be done under the 50th section. The 53rd section directs what shall be done when the summons is served upon the sub-tenant. I am therefore of opinion that, inasmuch as all the proceedings against the tenant Usher were perfectly regular, it was lawful for the bailiff under the warrant to evict the plaintiff from the possession of the shed, and to give the possession of it to the defendant, and consequently that no action can be maintained against him or any one assisting him in so doing.

The second question is, whether the action of trespass can be maintained against the defendant for continuing in possession after the execution of the warrant, and I am clearly of opinion that it cannot. No entry was made, or attempted to be made, by the plaintiff on the shed after the warrant was executed, but merely this action of trespass was brought. It is common learning that to maintain trespass to real property the plaintiff must have been in possession at the time the trespass was committed. The gist of the action is the injury to the possession, and the plaintiff's having the title will not enable him to maintain trespass: 1 Chitty on Pleading, 194–197: *Butcher* v. *Butcher*. (1) Mr. Quain referred to the old proceedings in ejectment in support of his view; but they, in fact, prove the contrary. The defendant was compelled to admit the lease to John Doe, and his entry and subsequent ouster, for the very purpose of satisfying the law as to possession in an action of trespass. But so far as this Court is concerned, we are concluded. In the case of *Clarke* v. *Cleghorne* (2) in the sittings in Banco after last Hilary Term, we acted upon this principle. I am of opinion that this action cannot be maintained, and that if the plaintiff be desirous to dispute the defendant's title to the shed, he must do so by an action of ejectment.

Rule absolute.

Attorneys for plaintiff: *Westall & Roberts.*
Attorney for defendant: *Willett.*

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(1) 7 B. & C. 399.

(2) Feb. 10, 1871. *Clarke* v. *Cleghorne and Others* was an action of trespass tried before Cleasby, B., at the Liverpool Summer Assizes, 1870. The plaintiff had assigned to the defendants a shop and premises in which he carried on his trade as a security for advances made by them to him; at the time of the assignment he gave them possession by allowing them to turn him out and lock the door upon him; they then handed the key to a servant of his to hold *as their agent*, and the plaintiff returned to the house, where he continued with their assent, working up his stock of materials. A dispute having arisen, the defendants turned him out, and he then commenced this action of trespass, questioning the validity of the deed of assignment. The learned judge nonsuited him on the ground that the defendants were never out of possession; and a rule subsequently obtained for a new trial on the ground of misdirection was discharged on the above-mentioned date.

Leofric Temple for the plaintiff, *Holker, Q.C.*, for the defendants.

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Measurement of Distance—Covenant not to carry on Trade within a specified distance—Distance "as the Crow flies"—Nearest Mode of practicable Access.

The defendant covenanted with the plaintiff not to carry on the business of a publican within half a mile of the plaintiff's premises. He afterwards carried on that business within half a mile, if the distance were measured in a straight line, "as the crow flies," but not within half a mile, if the distance were measured by the nearest mode of practicable access:—

Held (by Martin and Channell, BB., Cleasby, B., dissenting), that there had been a breach of the covenant.

Affirmed in Ex Ch. L.R. 8 Ex. 32.

ACTION to recover a sum of 500*l.* as liquidated damages for the breach by the defendant of his covenant with the plaintiff that he would not carry on the business of a publican within the distance of one-half of a mile of the premises called the "Lord Holland." The defendant traversed the breach. Issue.

The cause was tried before Martin, B., at the Middlesex sittings in Michaelmas Term, 1871, when it was proved that the defendant had carried on the business of a publican in a house within the distance of one-half mile of the plaintiff's house, the Lord Holland, measuring in a straight line, or "as the crow flies," but beyond that distance, measuring by the nearest mode of practicable access. A verdict was entered for the plaintiff for 500*l.*, with leave to move to enter a verdict for the defendant, if the Court should be of opinion that the true mode of measurement was by the nearest mode of practicable access. A rule was afterwards obtained accordingly.

Nov. 18, 1871. *Parry, Serj.*, and *F. Turner*, shewed cause.

Garth, Q.C., and *A. L. Smith*, supported the rule.

The cases cited and the arguments used are fully stated in the judgments of the learned Judges.

Cur. adv. vult.

Jan. 17. The Court being divided in opinion, the following judgments were delivered:—

MARTIN, B. The question in this case is in its terms very simple. The plaintiff had bought from the defendant a public-house

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called the "Lord Holland," and the defendant covenanted that he would not carry on the business of a publican "within the distance of one-half of a mile of the premises called the 'Lord Holland,'" and the question is how the distance of half a mile is to be measured. The plaintiff contends that the true mode of measurement, that is, the true construction of the language used, is that a circle of half a mile radius is to be drawn round the Lord Holland, and that if the defendant carries on the business of a publican within this space he has broken his covenant. The defendant on the other hand contends that the true construction of the covenant is, that if there be half a mile between the Lord Holland and the house where the defendant carries on business, measured by the nearest way of access, there is no breach of the covenant.

Now if the question were new and had never before arisen, I think the plaintiff's contention is right. Every written document is to be construed according to the ordinary natural and grammatical meaning of the language used, and when a man covenants that he will not do an act within a certain distance of a given spot, it seems to me that the true mode of determining the distance is to describe a circle, with a radius of the distance, around the spot, and that if the act be done within this circumscribed distance the covenant is broken, and that it is an unnatural and unreasonable construction to say that the distance is to be measured by the then existing way of access. Supposing the Lord Holland was on the bank of a river fifty yards wide, and that the bridge across the river was upwards of a quarter of a mile from the Lord Holland, this construction of the covenant would enable the covenantor to set up a public-house on the opposite bank, within fifty yards of the Lord Holland. This, as it seems to me, would be in direct contravention both of the words and spirit of the covenant. Again, supposing that by the existing mode of access the distance was upwards of half a mile, but by a new road the distance was reduced to less than half a mile, there would be no breach of the covenant until the new road was made; but there would be afterwards. I cannot but think such a construction of the covenant would be unreasonable, giving it one operation in one state of things, and another in another; and if I had had to decide the question, independently of all authority, I would be of

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opinion that the plaintiff's construction of the covenant was the true one, and the more consistent with reason and certainty.

But in my judgment the authorities are conclusive. Passing over for the present the case of *Wing* v. *Earle* (1), the first case in order of time is *Woods* v. *Dennet* (2), and there Lord Ellenborough expressed his opinion at *nisi prius* that the nearest way of access was the proper mode of measurement. The next case was *Leigh* v. *Hind.* (3) The covenant there was that the defendant would not carry on the business of a victualler "within the distance of half a mile from the premises assigned," a public-house in Bishopsgate Street in London. It was found by an arbitrator that the defendant carried on the business of a victualler within half a mile by the nearest way of access, and of necessity within the radius of the half mile, and the unanimous judgment of the Court was that the covenant was broken; but Lord Tenterden and Mr. Justice Littledale stated their opinion to be that the distance was to be measured by the nearest way of access, and Mr. Justice Littledale stated that if the covenantor took a public-house, the distance of which, by the then shortest way of access, was greater than the half mile, there would be no breach of covenant; but if a new street were opened, whereby the distance became less than half a mile, there would be a breach. On the other hand, Mr. Justice James Parke declares his dissent from this construction, and said that he was of opinion that the proper mode of measuring the distance was by taking a straight line from house to house, or, as he expresses it "as the crow flies." He referred to the case of *Woods* v. *Dennet* (2), and there is no room for mistake or misunderstanding as to his opinion. Now these opinions were not necessary for the decision of the case, but they were the opinions of three of the most eminent judges of modern times, and the present question is, which of them have been adopted in subsequent judgments. The question next arises in *Reg.* v. *Inhabitants of Saffron Walden.* (4) That decision was upon an enactment that no person should retain a settlement in a parish for any further time than he should inhabit within ten miles thereof. The case of *Leigh* v. *Hind* (3) was cited. Lord Denman said the most reasonable rule was that approved of by

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(1) Cro. Eliz. 212.

(2) 2 Stark. N. P. 89.

(3) 9 B. & C. 774.

(4) 9 Q. B. 76.

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Mr. Justice Parke, namely, a measurement by a direct line. He added, this would avoid the practical difficulty of settlement being good one day and bad the next; or that there should not be a breach of covenant one day, but a breach the next. The next case is *Stokes* v. *Grissell* (1): the question there was whether "the plaintiff dwelt more than twenty miles from the defendant;" Jervis, C.J., stated his opinion to be that the proper measurement was a straight line on the horizontal plane from point to point, and not by the road. Mr. Justice Maule stated that he agreed with Mr. Justice Parke in *Leigh* v. *Hind* (2), and that in his opinion the proper mode of measuring was on a straight line from point to point, and that upon the question he entertained no doubt at all. The next case is *Lake* v. *Butler.* (3) The question was, whether the plaintiff dwelt more than twenty miles from the defendant, and Lord Campbell, Mr. Justice Erle, and Mr. Justice Crompton expressed a clear opinion that the straight line and not the nearest way of access was the true mode of measurement. The next case is *Jewel* v. *Stead.* (4) The question there arose upon an enactment that no toll-gate should be erected within three miles of another toll-gate called "Bargate." The toll-gate was by the road more than three miles from Bargate, but by the straight line less. Now here it might have been plausibly argued that the object of the legislature was to protect the traveller from a second toll until he had travelled three miles of road, and that when he had travelled three miles the legislature did not mean to prohibit a second toll, but the Court of Queen's Bench held that the straight line was the true measurement. These are the authorities in the courts of law, but there is a case in equity directly in point to the same effect—*Duignan* v. *Walker.* (5) An attorney had covenanted not to carry on business within seven miles from the plaintiff's office. The question was raised—nearest way of access or straight line—and the present Lord Chancellor decided, apparently without doubt or difficulty, that the distance was to be measured in a straight line upon a horizontal plane. There was another case cited, *Wing* v. *Earle.* (6) The defendant had sold the plaintiff wood which was to be growing four miles from Rye, in Sussex. The defendant pleaded that the wood by the nearest and usual highway was four miles from Rye. The Court gave judgment for the plaintiff. Mr. Justice Fenner said that if the question had been upon a statute, the miles should be construed according to the usual way for carriages, but upon the condition, which is the same as a covenant or contract, if it be within four miles any way the condition, or in other words, the covenant or contract is broken. This is in favour of the plaintiff's contention.

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(1) 14 C. B. 678; 23 L. J. (C.P.) 141. 18 Jur 519

(2) 9 B. & C. 774.

(3) 5 E. & B. 92; 24 L. J. (Q.B.) 273. 1 Jur NS 499

(4) Joh. 446; 6 E. & B. 350; 25 L. J. (Q.B.) 294. 2 Jur NS 783

(5) 28 L. J. (Ch.) 867. 5 Jur NS 976

(6) Cro. Eliz. 212.

My opinion is, that the construction put upon the covenant by Mr. Justice Parke and Mr. Justice Maule is the correct one. All the subsequent authorities without exception adopt it; there is no authority to the contrary, at least none has been cited by the learned counsel for the defendant. It was said that one construction was to be given to these words in an Act of Parliament, and another in a deed or contract. I should be very loth to do so. It possibly may be that circumstances may exist in a peculiar case to justify such construction, but in my opinion there is nothing in this case calling for it. It was also said that the measurement of the straight line, as stated in some of the judgments, is not practicable. I have inquired as to this from one of the most competent persons in this kingdom, and have been informed that it may be easily measured with sufficient correctness for all practical purposes by means of the Ordnance Map.

There is the case of *Atkyns* v. *Kinneir* (1) (I believe not cited in the argument), in which it is supposed that Mr. Justice (then Baron) Parke expressed himself as having altered his opinion in the case of *Leigh* v. *Hind.* (2) I do not so understand him. The covenant there was "that the defendant would not practise as a surgeon at No. 28, Dorset Crescent, or within two and a half miles thereof, *measuring by the usual streets, or way, or approach thereto,* nor reside within two and a half miles of No. 28, Dorset Crescent." There can be no doubt as to the meaning of this covenant, and all that I understand him to have said is, that the rule for such a case was laid down in *Leigh* v. *Hind* (2), namely, that the true principle of admeasurement is to take the nearest mode of access according to the existing state of the streets. This was the opinion

(1) 4 Ex. 776.

(2) 9 B. & C. 774.

of the majority of the Court, but I find nothing to indicate that he himself had altered his opinion.

In my judgment, both upon the reason of the thing and on authority, the plaintiff's contention is right, and the rule ought to be discharged. My Brother Channell agrees in this judgment.

CLEASBY, B. In this case the question arises upon the proper construction of a covenant in the assignment of the lease of a public-house called the "Lord Holland."

The covenant is a usual one, and the words are, "that the defendant will not carry on the business of a publican within the distance of one-half of a mile of the premises called the 'Lord Holland.'" And there is a covenant to pay a sum of 500*l.* as stipulated damages for the breach of this covenant.

The defendant had taken a public-house after the assignment, and carried on business in it, and the question was, whether this was a breach of the covenant according to its proper construction. There was a verdict for the plaintiff for the stipulated damages, 500*l.*, with leave for the defendant to move the Court to enter a verdict in his favour.

The plaintiff contended that in ascertaining the distance it was to be measured by the shortest line, or as the crow flies; the defendant contended it was to be measured by the nearest available mode of access between the two houses.

In my opinion the distance is to be measured as a travelled distance, and I should say the proper terminus would be from the door of or entrance to one place of business to the door of or entrance to the other.

I cannot think it would be in accordance with the intention of the parties to ascertain first, by some process not very easy, what are the two points of the two places of business which are nearest to each other, and then, by another process (perhaps more difficult) what would be the length of the line drawn between those two points. If one can suppose the question to arise as an abstract question, what is the distance between two fields, I apprehend the latter would be the proper mode of arriving at it. And in general, in ascertaining the distance between two known things, whether it be of a planet from the sun at a particular time, or of one beacon or telegraph from another, it would be ascertained by supposing a line to be drawn straight (or, as the phrase is, "as a crow flies,") from one to the other, and then calculating the length of that line. But where the question does not arise in this form, but the distance is coupled with something to be done within or without that distance, I apprehend no such rule can be applied. It is true that words are to be read generally in their ordinary, natural, and grammatical meaning; but this does not mean that the words are to be taken by themselves, as if they stood alone, and then their ordinary and natural meaning given to them. I conceive the subject-matter and object of the whole agreement must be first considered before the meaning of the words can be looked for with any chance of finding their proper meaning. The rule is correctly stated in Broom's Legal Maxims, 5th ed., p. 647: "The subject-matter of an agreement is to be considered in construing the terms of it, and they are to be understood in the sense most agreeable to the nature of the agreement." I feel satisfied that the word "distance" must receive a meaning depending upon the subject under consideration. For example, in considering the distance between London and its antipodes, if we were dealing with a subject relating to the intercourse between the two countries and voyages, I should say the distance would be taken upon the surface of the earth by the best course which a vessel could take; but if we were dealing with a subject relating to the system of the world and the magnitude of the planetary bodies, the distance would be the earth's diameter.

Now here we are dealing with a contract, the object of which is to protect one person from the competition of another, who has obtained in one public-house a certain connection, and may on other grounds be a successful rival; and the mode of doing this is by preventing the trade of the one from being carried on within a certain distance of the other. It strikes me very strongly, that this would be the distance it would take to get from one place to another. A person who was under a covenant not to carry on business within half a mile, and took another house at the distance of three quarters of a mile by the nearest road, would never think of his liability depending upon the length of an imaginary line, which cannot be trodden or measured, but only calculated.

It was suggested in argument, that the distance could be practically measured and ascertained upon an ordinary map; but even if it be assumed that an ordinary map is a mode of measurement contemplated or thought of by such persons as make these agreements, and also that the map of London would give the means of making this measurement with anything like accuracy, I do not think the construction of such a contract can depend upon there being of late a survey upon a large scale, and that it would be one thing before such survey, and another after.

If you were to ask any person how far he lived from some friend, would not his answer have reference to the distance to be travelled? He might add, it was strange it was so far, because as the crow flies it was only half the distance. This would not shew that the words are to be understood in that sense, but the contrary.

In considering the distance between two places on the opposite slopes of a mountain, strictly speaking, it would be measured by a straight line passing through the earth and joining them; but, except when some scientific subject was under consideration, would any one think of measuring it, except on the surface—that is, by going up to the top of the mountain, and then down again, and so, perhaps, doubling the other distance.

My opinion, therefore, independently of authority, would be that the covenant in this case would not include every place within an imaginary circle drawn with a radius of half a mile, the centre being some part of the Lord Holland. I think, in determining whether any other place of business is within the covenant, no supposed circle need be drawn, but you have only to measure the distance of such a place from the Lord Holland in the manner which I have mentioned.

There is nothing in the authorities to bind me to come to a different conclusion. On the contrary, the preponderance of the authorities, when properly considered, is, I think, in favour of this view. I say properly considered, because I do not think that any authorities relating to the mode of measuring distance under different circumstances have any bearing upon the present case, for reasons which I have already given. In order to influence the decision in the present case, the distance must be assigned for the purpose of relieving one person from the competition of another in a particular trade. And this appears to dispose of most of the cases cited in the argument.

In the case of *Wing* v. *Earle* (1), the matter determined was upon a mere question of locality—how the distance of a wood from a certain place was to be measured. In the case of *Reg.* v. *Inhabitants of Saffron Walden* (2), the question arose upon the statute 4 & 5 Wm. 4, c. 76, which enacts that no person shall retain a settlement by reason of any estate or interest in a parish for a longer period than he inhabits within ten miles thereof. The Court thought that, as there was nothing in the nature of the subject to assist in the construction of these words, an arbitrary rule must be laid down. And they held the ten miles must be measured in a straight line from the residence to the nearest part of the parish. There are some remarks of the judges in this case which will be considered in connection with the cases involving the same question as the present.

In *Stokes* v. *Grissell* (3), which was pressed on behalf of the defendant, the question adverted to (but not raised for decision or decided), was, how the distance of twenty miles, mentioned in an Act of Parliament (the County Court Act, 9 & 10 Vict. c. 95), was to be measured, and the case has no bearing upon the construction of an agreement like the present, where the subject-matter and intention of the parties must be considered. The observations of the judges, particularly Mr. Justice Maule, so far as they bear upon the present case, will be afterwards noticed.

In *Lake* v. *Butler* (4) the question was the same as in *Stokes* v. *Grissell* (3), viz., the measurement of the twenty miles mentioned in 9 & 10 Vict. c. 95, and the Court adopted the view expressed in the former case; but there is nothing in the judgments indicating an opinion in favour of the straight line rule in such a case as the present. On the contrary, the judgments are all founded upon the general words of the Act of Parliament.

In *Jewel* v. *Stead* (5) the question arose upon a turnpike Act, which provided that no toll-gate should be erected within three miles of another toll-gate, and all that was decided was, that the general rule should be adhered to, that when in an Act of Parliament distance is mentioned generally without any other guide, the straight line rule is to be adopted. This is one of the cases in which Lord Campbell says that the distance is to be measured by a straight line on the horizontal plane. This measurement of distance on a horizontal plane is a proper mode of measurement when you are laying down an arbitrary rule to determine whether a particular case comes within an Act of Parliament or not, there being no question of conduct and of liability by reason thereof; but when the whole question arises upon the conduct of the parties, such a rule, it is submitted, is wholly inapplicable. For the consequence would be, that if a man were upon a tolerably steep hill to measure a straight line from one house to another, and find the distance thirty or forty yards beyond the half mile, and upon that measurement to start business at the other house, he might afterwards find himself made liable by the operation of this rule, because the distance taken upon the horizontal plane was less than the half mile.

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(1) Cro. Eliz. 212.

(2) 9 Q. B. 76.

(3) 14 C. B. 678; 23 L. J. (C.P.) 141. 18 Jur 519

(4) 5 E. & B. 92; 24 L. J. (Q.B.) 273. 1 Jur NS 499

(5) 6 E. & B. 350; 25 L. J. (Q.B.) 254. 2 Jur NS 783

The above authorities were relied on by the defendant upon the argument, and it is submitted they bear very remotely upon the present question.

The authorities which really bear upon the present case are the following:—

Woods v. *Dennet.* (1) In this case the same question arose as in the present case, how the distance was to be measured when a person, under similar circumstances to the present, gave a bond not to carry on the business of a cheesemonger within a mile of the plaintiff's shop. The distance had been measured different ways, and there can be no doubt that if the distance had been taken, including all within a radius of a mile, the place would have been within it. The rule laid down by Lord Ellenborough for the guidance of the arbitrator, to whom the case was referred, was, that in ascertaining the distance, the shortest way of access by the footpath was the proper line for admeasurement.

We have, therefore, a decision in point so far back as 1817, on a matter upon which persons would make a rule to go by, and which may have influenced the conduct of persons under like circumstances since.

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(1) 2 Stark. N. P. 89.

There is then the case of *Leigh* v. *Hind*. (1) In that case the question was precisely the same as the present, arising upon the assignment of a lease of a public-house in London. The case had been referred, and the arbitrator had the measurement made in three different modes, all of them connected with the modes of access. And he found, as a fact, that the one house was within half a mile of the other. If the distance could have been taken by the suggested radius, it was clearly within the distance, and no question could have arisen, and the majority of the Court must have rejected such a measurement. Nothing can be clearer than the judgment of Lord Tenterden and Mr. Justice Littledale. The radius measurement had been suggested, but they do not think it worthy of notice. The question may be stated to have been between the mode of access which was actually the nearest, and which went part by footway and part by the carriageway, which it was suggested the customers of the public-house would not use, and another by the footway, which it was said the customers would use, and the difference was very small between them, but sufficient to turn the balance. Lord Tenterden says, "Now, unless the nearest mode of access be taken, it is impossible to say what other mode should be taken. If we depart from it a little in this case we may be called upon to depart from it still more in another, and the consequence will be that there will be no certain rule applicable to the subject. I think the distance must be measured by the nearest mode of access." Nothing can be stronger than this language. Lord Tenterden considers it as the settled rule not to be departed from.

The language of Mr. Justice Littledale is equally strong. He says, "The true principle of admeasurement is to take the nearest mode of access according to the existing state of the streets. If subsequently to the assignment the covenantor took a public-house the distance of which by the then shortest mode of access would be greater than that agreed upon from the one he sold, and a new street was afterwards opened whereby the distance by the shortest mode of access became less than the one mentioned

(1) 9 B. & C. 774.

in the covenant, the covenantor would thereupon incur a breach." So that the actual distance at the time as influencing the trade of the one upon the trade of the other is the test, and the covenantor takes upon himself by his general covenant the risk of any alteration.

Mr. Justice Parke, in that case, was of a different opinion. He thought that the proper mode of measuring the distance would be to take a straight line from house to house, in common parlance "as the crow flies," and that it should be ascertained without any reference to the modes of communication. But the reason which he gives is, that neither of the parties contemplated that the customers of one public-house were to go thence to the other. This is quite true, but does not seem a good reason, as the object of the covenant was not to guard against customers going from one house to the other, but to secure the covenantee a certain area of custom between the two houses, free from the injurious competition of the covenantor. The learned judge adds that in *Woods* v. *Dennet* (1), the plaintiff's counsel may have thought it unnecessary to insist upon this mode of admeasurement, as he probably considered he had a good case, supposing the other to be adopted. I can hardly think this well founded; it suggests that the plaintiff's counsel did not think it worth while to insist upon a test which was certain in his favour, because he had another uncertain one on which he might succeed. The opinion of so eminent a judge would, no doubt, take from the weight of the other authorities; but whatever his opinion at the time of the last cited case was as to what the rule ought to be, the effect of it is entirely removed by his clear opinion in a subsequent case as to what the rule really was; and what is the result of the decision in the case of *Leigh* v. *Hind* (2) last referred to? I refer to the case of *Atkyns* v. *Kinneir*. (3) The defendant, in addition to a covenant not to carry on the business of a surgeon within a certain distance from 28, Dorset Square, to be measured in a particular manner, also covenanted generally not to reside within the distance of two miles and a half from that place. The following is Baron Parke's judgment: "The question was, whether the defendant resided within two miles and a half from the plaintiff's residence, measuring by any of the usual ways of communication. The rule laid down in *Leigh* v. *Hind* (1) is, that when there is a stipulation as to non-residence within a prescribed distance, the true principle of admeasurement is to take the nearest mode of access according to the existing state of the streets. The object of this covenant was to prevent the defendant from residing within two miles and a half of the plaintiff, measuring by any of the usual and ordinary modes of communication." So that Baron Parke distinctly recognizes, in 1850, the rule laid down in 1829 by Lord Tenterden and Mr. Justice Littledale, in *Leigh* v. *Hind* (1), as the proper one, though at variance with the opinion then expressed by him. And this rule, as applied to such a case, appears to have been regarded as a settled rule by the Court of Queen's Bench, in the *Saffron Walden Case* (2) already referred to, in which they applied the straight line test to the Act relating to settlements. Lord Denman says in that case: "In *Leigh* v. *Hind* (1) one learned judge, my Brother Parke, thought that the natural mode of estimating the distance was as the crow flies; but there with reference perhaps to the object of the contract, the measurement by the nearest accessible route was adopted. Here we are very much at large, and without materials for judgment; we find no words referring to any particular object. We have, therefore, to lay down a fixed and absolute rule." It is going a great way to cite this as an authority for the straight line rule as applicable to such a case as the present, when the reason for adopting it was that there were not such materials as the present case presents for any other rule. Mr. Justice Patteson's judgment is to the same effect, and founded entirely upon there being in that case no other guide except the words "ten miles."

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(1) 2 Stark. N. P. 89. (2) 9 B. & C. 774. (3) 4 Ex. 776.

We have therefore, it is submitted, a remarkable concurrence of authority, dating from the year 1817, and reaching to 1850, upon which it would be supposed men could act with a feeling of perfect security.

The authorities in favour of the straight line rule, as applied to such a case as the present, are, first, the incidental remarks of Mr. Justice Maule in *Stokes* v. *Grissell.* (3) He says in his judgment (4), "As to the mode in which the twenty miles are to be

(1) 9 B. & C. 774.

(2) 9 Q. B. 76.

(3) 14 C. B. 678; 21 L. J. (C.P.) 141.

(4) 23 L. J. (C.P.) at p. 143. 18 Jur

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measured, I think that pointed out by my Brother Parke is the right one, and that they are to be measured by a straight line drawn from point to point." He then goes on to say, after referring to the words of the 128th section of the Act of Parliament, that there is no manifest inconvenience in giving to the words their plain unambiguous meaning, and that the distance should be measured as the crow flies. Without detracting from the value of anything said by that eminent judge, it may be observed, first, that the mode of measurement was not the subject for discussion; and, secondly, that so far as it arose incidentally, Mr. Justice Maule was applying it to an Act of Parliament, and not to an agreement where the object of the parties is to be considered.

The only other authority in favour of the plaintiff is a case in equity, *Duignan* v. *Walker*. (1) It was much relied on as being in point in his favour. It arose upon an application to commit a man for breach of an injunction not to practise as an attorney, or clerk to an attorney within seven miles from the plaintiff's office. The report is in a few lines, and no case was cited except *Lake* v. *Butler* (2), which decided that the twenty miles mentioned in the County Court Act must be measured in a straight line. The learned judge (Wood, V.C.), is reported to have said, "The distance must be measured in a straight line upon a horizontal plane," and as the facts were disputed, all that the judge did was to direct an inquiry.

Upon this case it may be fairly observed (without relying upon any supposed distinction between that case and the present), that all that was done was to direct an inquiry, and when the question of committal came forward the case might perhaps be more carefully considered, and further that the Court was dealing with the terms of its own injunction; and as the case of *Lake* v. *Butler* (2) was the only one referred to, the conclusion arrived at would naturally follow. And it is tolerably clear that *Lake* v. *Butler* (2) (though, as has been already shewn inapplicable) was implicitly followed, for the words of the judgment are identically the same as those of Lord Campbell in that case, including the horizontal plane.

It is submitted that this authority does not balance the weight

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(1) Joh. 446; 28 L. J. (Ch.) 867
5 Jur NS 976

(2) 5 E. & B. 92; 24 L. J. (Q.B.) 273.
1 Jur NS 499

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of authority already given for the other conclusion, and I am, in my judgment in this case, much influenced by the consideration that, if the distance were so far extended by now adopting the radius rule, many persons would be exposed to actions for large amounts of unliquidated damages who had regulated their conduct by a rule founded upon ample authority. They would not relieve themselves from this liability by removing their business, in consequence of a different rule being now laid down.

I think the rule should be made absolute to enter a nonsuit.

Rule discharged.

Attorneys for plaintiff: *Stileman & Neate.*
Attorneys for defendant; *Shum & Crossman.*

Jan. 17.

WILSON *v.* HODSON AND ANOTHER.

Executor of Executrix de Son Tort—Liability for breaches of Contract by Person with whose Assets Executrix de son Tort has intermeddled.

The executor of an executrix de son tort is not liable for a breach of contract committed by the person with whose property the executrix de son tort has intermeddled.

DECLARATION against the defendants as executors of Anne Browne, who was the executrix of Warham Browne, alleging that on the 23rd of June, 1853, an agreement in writing was made between the plaintiff and Warham Browne in the words following [here followed the agreement, which was for a demise for a term of certain furnished premises, with stipulations (among others) that the furniture, &c., should be kept in the same state as when delivered to the lessee, and that the premises should be kept in good and tenantable order, and so given up.] That Warham Browne occupied until his death, whereupon Anne Browne entered and occupied as executrix until her death, after which the defendants surrendered the premises and quitted occupation thereof; that Warham Browne did not, nor did Anne Browne as executrix, keep the furniture in the same state as when delivered to Warham Browne, nor did they, or either of them, keep or give up the premises in good and tenantable repair.

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Plea 12: That Warham Browne died intestate, and Anne Browne was never his executrix otherwise than executrix de son tort, and that the defendants never had notice or knowledge that Anne Browne entered upon or occupied the premises otherwise than in her own right, or that she had ever rendered herself liable to be charged as such executrix de son tort of Warham Browne.

Demurrer and joinder in demurrer.

Trevelyan, in support of the demurrer. The executrix de son tort would have been liable in her lifetime for breaches committed by Warham Browne; and her executors are liable as such, although she was not executrix otherwise than de son tort. Anne Browne having intermeddled with the intestate's assets would have been estopped from denying her liability, and that estoppel binds the defendants. Again the provisions of 30 Car. 2, c. 7, s. 2, explained and made perpetual by 4 & 5 W. & M. c. 24, s. 12, apply. By those statutes it is enacted that the executors or administrators of any executor or administrator whether rightful or of his own wrong, who should waste, or *convert to his own use*, the goods of his testator or intestate, should be liable and chargeable in the same manner as their testator or intestate would have been if they had been living; and in this declaration there is an allegation that Anne Browne entered and occupied the premises, and did not perform the stipulations in the memorandum of agreement. This is equivalent to a suggestion of waste, or, at all events, of conversion of the plaintiff's goods. [He cited *Browne* v. *Collins* (1); *Wells* v. *Fydell* (2); *Carmichael* v. *Carmichael* (3); *Oxenham* v. *Clapp* (4); *Meyrick* v. *Anderson*. (5)]

Ridley, contrà. The declaration does not sufficiently allege a devastavit by the executrix de son tort, so as to bring the case within 30 Car. 2, c. 7; so that the question is, whether, apart from statute, the executors of the executrix de son tort are liable for a breach of contract committed by the person with whose assets the executrix de son tort has intermeddled. They are free from liability, just as the executors of an administrator are held to be free, because the executrix de son tort, like an administrator, is not

(1) 1 Vent. 292.
(2) 2 Ph. 101.
(2) 10 East, 315.
(4) 2 B. & Ad. 309.
(5) 14 Q. B. 719.

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a person in whom the deceased has reposed any trust. Indeed their case is stronger than that of an administrator, for the executrix de son tort is appointed neither by the Court nor the testator. Again, there is no such estoppel as is suggested. The executrix would have been herself estopped, because she had actually meddled with the property of the deceased. But with her death the reason of the estoppel ceases, and her representatives upon whom the property does not devolve, are not bound by it. [He cited Shep. Touch. by Preston, vol. ii. 464; Viner's Abr. tit. Executors, C. (a), F. (a, 5); Anon. Case (1); *Wheatley* v. *Lane.* (2)

Trevelyan, in reply.

KELLY, C.B. I think the defendants are entitled to our judgment. They are not the executors of the person who made the contract, of which there was a breach, nor the executors of the rightful representative of that person. No doubt if they were the executors of the duly appointed executor of the contractor the case would be different. Their then testator would have been entitled to possess himself of the first testator's effects, and they would themselves have been liable, unless indeed they could have pleaded plene administravit. But here the defendants are executors of an executrix de son tort, who had not in her lifetime any power to possess herself of the testator's effects, and whose representatives therefore could not claim them. In the analogous case of an executor of an administrator there is no such liability as is contended for in this case. I may add that there is no authority whatever for the proposition contended for by the plaintiff. The principal case cited on his behalf, that of *Wells* v. *Fydell* (3), has really no application, for it was not a case in which the liabilities of an executor of an executor de son tort were considered at all. Moreover, I think the statute 30 Car. 2, c. 7, is conclusive against the plaintiff. Until the passing of that Act the executor of an executor de son tort was not liable even in the case of a devastavit, much less where there has been no devastavit. It is urged that the declaration may be construed as suggesting a devastavit, but that cannot be without putting a very strained meaning upon it.

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(1) 2 Mod. 293.

(2) Notes to Wms. Saund. 239.

(3) 10 East, 315.

It is not a declaration under the statute, but must be read in its ordinary sense as charging the defendants as executors with a mere breach of contract committed by the intestate. Reading it in this, its ordinary sense, I think the plea forms a good answer to it.

Martin, B. I am of the same opinion. The declaration is not framed under the statute of Car. 2, but upon a supposed common law liability in the defendants as the executors of the person who made and committed a breach of a contract with the plaintiff. The plea shews the defendants to be the executors of the executrix de son tort of the contracting party, and this seems to me to be a good answer to the declaration. Mr. Ridley's able argument shews that although no case exactly in point has been decided, there can be no doubt as to what our judgment should be. The statute of Car. 2 is beside the question, for there is not in this case any suggestion of a devastavit having been committed by the defendants' immediate testatrix.

Cleasby, B. I also think the declaration is answered by the plea. It is contended that it shews by implication a devastavit by the defendants' testatrix. But it cannot be so construed in my judgment. Any liability, therefore, which they might have incurred for a devastavit by their testatrix under the statute of Car. 2 is out of the case. I agree, therefore, that our judgment on this record must be for them.

Judgment for the defendants.

Attorneys for plaintiff: *Westall & Roberts.*
Attorneys for defendants: *Cunliffe & Beaumont.*

1872
Jan. 25.

CROUCH *v.* TREGONNING.

Indemnity—Incomplete Assignment of Term—Landlord and Tenant—Occupation under Agreement to Assign—Use and Occupation.

The plaintiff was tenant to L. of a farm from Michaelmas, 1858, for seven, fourteen, or twenty-one years, at tenant's option, at a rent of £80 a year, payable quarterly. In March, 1869, he purported, by an agreement not under seal, to assign the residue of his interest to the defendant, who entered and occupied the farm; but L. withholding his licence, which was necessary under the plaintiff's lease, no actual legal assignment was ever executed. At Michaelmas, 1870, the defendant quitted the farm, having given L. a notice of his intention to do so. He might have continued to occupy if he had thought proper, but in fact the property stood empty after Michaelmas. The defendant, whilst in occupation, paid rent to L. for the plaintiff. He never was accepted as tenant by L. In March, 1871, the plaintiff paid L., in respect of rent due from the September previous, the sum of £40, which he now sought to recover from the defendant, either upon an implied indemnity, or by way of rent, or for use and occupation:—

Held, that he was not entitled to recover, there not having been under the circumstances any promise to indemnify the plaintiff against rent accruing after the defendant's actual occupation had ceased, nor any such relation of landlord and tenant existing between the parties as would entitle the plaintiff to the repayment by the defendant, either as rent or compensation for use and occupation, of the sum paid to L. by the plaintiff.

DECLARATION: 1st count. That the plaintiff was tenant to one Edward Lanyon, of certain premises called "Crane Farm," at Camborne, in Cornwall, for an unexpired term, and at a certain rent, specified in a deed made on the 30th of December, 1858, between the plaintiff and Lanyon, and afterwards, in consideration that the plaintiff would give up possession of the farm for the residue of the term to the defendant, and permit the defendant peaceably to occupy and enjoy the same, the defendant promised the plaintiff that he would pay the rent of the farm for the unexpired residue of the term to Lanyon, and would indemnify the plaintiff during the unexpired residue against the payment of the rent; that all conditions were fulfilled, &c., yet the defendant did not pay the rent and indemnify the plaintiff, whereby the plaintiff was obliged to pay, and has paid, two quarters of the rent then due to Lanyon.

2nd count. That the plaintiff let to the defendant certain premises called "Crane Farm," at Camborne, in Cornwall, to hold from

10th March, 1869, for the unexpired residue of a term of twenty-one years, commencing from the 30th December, 1858, at a rent of 80*l.* per annum, payable from the 25th March, 1869, quarterly, of which rent two quarters were due and unpaid.

3rd count. For use and occupation, and money paid.

Pleas: 1. To first count, denial of the promise. 2. To second count, denial of the demise. 3. To residue, never indebted. Issue.

The cause was tried before Willes, J., at the Bristol Summer Assizes, 1871, when the following facts were proved:—Edward Lanyon, on the 30th December, 1858, leased Crane Farm, Camborne, in Cornwall, to the plaintiff, for seven, fourteen, or twenty-one years, at the tenant's option, from Michaelmas, 1858, at 80*l.* a year. The lease contained a covenant not to assign, underlet, or part with the possession of the premises without the landlord's written licence. The plaintiff occupied the farm until March, 1869, when he agreed with the defendant, by a memorandum of agreement, dated 10th March, to sell all his interest in the property to the defendant, with the live and dead stock, for a sum to be ascertained by valuers. A valuation was made accordingly, and the sum arrived at was paid by the defendant, who entered into occupation, under the agreement at the beginning of May. The memorandum of agreement was not under seal, and was silent as to who was to pay rent; and the landlord's written licence was never obtained. The fact of the defendant's occupation was known to him, and not objected to; but the defendant was never accepted as his tenant, and paid the rent reserved during the time he occupied to Lanyon's agent, for the plaintiff, taking receipts made out to the plaintiff. At Michaelmas, 1870, the defendant quitted the farm, having given to Lanyon, but not to the plaintiff, a notice to quit in the March previous, which he insisted put an end to his liability. If the defendant had thought proper, he might have occupied the land from Michaelmas, 1870, to March, 1871, but he did not in fact do so. It was left empty during that period. Up to Michaelmas he had all the benefit that could be got out of the land. The plaintiff having paid 40*l.* to Lanyon for rent accruing from Michaelmas, 1870, to March, 1871, now sought to recover that amount from the defendant. A verdict was entered upon these facts for the plaintiff, with leave reserved to move to enter a verdict for the defendant. A rule was afterwards obtained accordingly, on the ground that the defendant was not assignee of the plaintiff, and even if assignee, was not liable to pay rent, there being no express or implied contract of indemnity.

Jan. 23. *A. Charles* (*H. T. Cole, Q.C.*, with him) shewed cause. The defendant occupied until Michaelmas, 1870, and might have gone on occupying. He never terminated his occupation legally, his notice to quit being bad, given as it was to the wrong person, and for the wrong quarter day. Under these circumstances there is an implied indemnity towards the plaintiff, arising from the defendant's acceptance of the estate. It is this which charges him, and not the execution by him of a deed: *Burnett* v. *Lynch.* (1) If there had been a regular assignment to him, he would certainly have been liable until he had by assignment over or otherwise divested himself of the estate. It can make no difference, quoad the plaintiff, that there was no regular assignment. The defendant accepted the estate, such as it was, and was not disturbed by Lanyon, who did not object to his being there, although he withheld his written licence. But, secondly, the plaintiff is entitled to recover as the defendant's landlord. The defendant originally entered under the equitable assignment, but he remained long after he knew that the assignment could not, for want of the landlord's licence, be legally perfected. He was therefore an occupier under a sale which had gone off, and tenant at will to the proposed vendor: *Howard* v. *Shaw.* (2) Then, by paying rent to the plaintiff, which in effect he did by paying Lanyon for him, this tenancy at will became a tenancy from year to year, terminable at the March quarter. He was therefore liable either under the second or third counts. He had given an insufficient notice to quit, and continued responsible for the rent. Moreover, he had received the whole benefit of the farm up to Michaelmas, and had the opportunity of continuing his occupation if he had pleased. Constructively, if not actually, he was in occupation until March, 1871.

Lopes, Q.C., in support of the rule. There can be no implied

(1) 5 B. & C. 589.

(2) 8 M. & W. 118.

indemnity, at all events beyond the period during which the defendant actually occupied the premises: *Wolveridge* v. *Steward.* (1) Assignment over would have freed him from liability. Here, through the plaintiff's failure to obtain his landlord's assent, the defendant had no estate to assign, but giving up possession must be treated as equivalent to assignment. With regard to the second and third counts, no relation of landlord and tenant ever existed between the plaintiff and defendant. The defendant occupied under the agreement of 10th March, 1869, by which he expected to become absolute assignee of the term. The negotiation never definitely went off, but from first to last the assent of the landlord was hoped for by both parties. But even assuming a tenancy, it never was from year to year. The payment to Lanyon cannot, except by a forced construction, be treated as a payment to the plaintiff of rent. Lastly, there was no occupation after Michaelmas sufficient to charge the defendant on the third count.

Cur. adv. vult.

Jan. 25. BRAMWELL, B. I think this rule should be made absolute. The case has been put before us on behalf of the plaintiff on two grounds, but in my opinion both fail. First it is urged that under the circumstances of the case there was an implied promise on the part of the defendant to indemnify the plaintiff against the half-year's rent, from September, 1870, to March, 1871, which he has had to pay to Lanyon, his landlord. But I cannot assent to this view. The bargain between the parties was that a regular assignment of the term should be executed. This was never done, because the landlord's licence which was required could not be obtained, and, so far, the consideration for the defendant's promise failed. It is also suggested that although no valid legal assignment was ever obtained, there is an implied obligation on the defendant, arising from his entering upon and remaining to enjoy and use the farm. Now, I am by no means sure that any such promise could be implied by law, even during the period of the defendant's actual occupation. For he might well say, "I was entitled, under my agreement, not only to possession of the farm, but to a valid assignment of the plaintiff's lease; and not having obtained such an assignment through the plaintiff's default—for it was his duty to get his landlord's licence—no promise to indemnify my intended vendor against rent he was liable to pay can be implied from the circumstance of my having occupied as his licensee." However this may be, I think it clear that in this case there was no implied indemnity as regards the rent now sought to be recovered. For that accrued after the defendant's actual occupation had ceased.

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(1) 1 C. & M. 644, at p. 660.

Then it was contended, secondly, that the facts established a tenancy from year to year between the plaintiff and the defendant, and the argument was put thus: that the defendant was in possession lawfully, and with the plaintiff's licence, and that therefore he was "tenant" to the plaintiff. Further, that rent having been paid to Lanyon, by the defendant for the plaintiff, this, in effect, was rent paid to the plaintiff, and thus, being a tenant, the defendant, had become a tenant from year to year to the plaintiff. But this is certainly what neither of the parties contemplated; and I do not think, from the facts before us, we can properly infer the existence of a yearly tenancy. It is true that the defendant was lawfully in possession. Lanyon could not have maintained trespass against him, nor could the plaintiff; but it does not follow that there was any tenancy; and looking at the way in which the defendant came in, and the circumstances under which he stopped in, I conclude that no relation of landlord and tenant ever was created; or, if there was, that the defendant's occupation was such as he was not bound to pay for. I am confirmed in this view by the expressions used by Parke, B., in *Howard* v. *Shaw* (1), where he says that the defendant, who had entered under a contract of purchase, was not bound to pay a compensation for the occupation of the land while the agreement under which he entered existed, because the contract shewed that he was to occupy without compensation, although he might have been a tenant at will until the conveyance was executed. In this case, however, I am unable to see any evidence of a tenancy to the plaintiff, or of any payment of rent to him so as to make the defendant a yearly tenant. The defendant paid Lanyon, as it seems to me, in the expecta-

(1) 8 M. & W. 114, at p. 122.

tion that he would become, or in the belief that he was, a regular assignee of the plaintiff. The original contract never went off. If it had, and if the parties had formally treated it as at an end, the case might have been different. But nothing of the kind happened; the contract remained imperfect, because the landlord's licence could not be obtained. Still, neither plaintiff nor defendant regarded it as completely off. Indeed, both seem to me to have continued to act upon it; hoping, probably, that sooner or later the landlord would give his licence. This being so, I am of opinion that there was no tenancy between the parties, and that, for the reasons already given, there was no implied promise to indemnify the plaintiff in respect, at all events, of rent accruing due after the defendant's actual occupation had ceased.

MARTIN, B. I am of the same opinion. Both parties seem to have treated the agreement of the 10th of March, 1869, as an actual assignment, although it was invalid, not being under seal, and I think both intended that the defendant should occupy the farm during the remainder of the term, paying the reserved rent to the landlord. This being the real intention of both the plaintiff and defendant, I should have been prepared to hold that the defendant was bound to indemnify the plaintiff against this rent, were it not for the case of *Wolveridge* v. *Steward* (1); according to which, it appears that his liability must be limited to the period during which he occupied as assignee. It was there laid down that an assignee was not liable for rent accruing due after he had assigned over to another person, but only during the period of his actual possession. But the rent now sued for accrued after the defendant had ceased to occupy, and on the principle of the case referred to, therefore, I do not think he can recover on the first count of the declaration.

Again, the defendant's case fails on the other counts. There is not, on the facts, enough to warrant us in holding that the relationship of landlord and tenant was ever established between the plaintiff and defendant. Nor can the plaintiff recover for money paid, for the money was paid primarily on his own, and not on the defendant's account. He was himself liable to Lanyon, and the defendant's liability, if it had existed, would have been by way of indemnity only.

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(1) 1 C. & M. 644.

Pigott, B. I also think the rule should be made absolute. The defendant entered and occupied the land under an agreement which was not in itself a valid assignment. There can be no doubt, however, either that he thought it was valid, or at any rate expected at some time to have it made valid. This expectation, owing to the landlord's refusing his licence, was never fulfilled, and therefore the defendant did not get what he had bargained for. Then in September, 1870, he throws up both land and contract, and cannot, in my opinion, be made liable on an implied promise to indemnify the plaintiff against rent accruing after that date. As to the second point, I do not think any relation of landlord and tenant ever existed between the parties. Certainly none such was ever intended. The defendant would seem to have thought he had become Lanyon's tenant. He was never the plaintiff's tenant, but merely continued to occupy, with the plaintiff's permission, pending the negotiations for a regular assignment, which do not appear ever to have come definitely to an end.

Rule absolute.

Attorneys for plaintiff: *Gregory & Rowcliffes, for Benson & Elletson, Bristol.*

Attorneys for defendant: *Price, Bolton, & Filder, for Daniel, Bristol.*

[IN THE EXCHEQUER CHAMBER.]

1872
Feb. 2.

16 Eq 100.-
17 Eq 453
9 Ch 412
9 QB 29
10 QB 22
1 Ex D 300
3 Ex D 4
2 CPD 40
14 ChD 1
15 ChD 45

SLATER *v.* PINDER.

Bankruptcy Act, 1869—*Execution—Seizure and Sale—Seizure before Act of Bankruptcy—Sale after Adjudication.*

An execution creditor for a sum less than 50*l.*, who has seized the goods of a bankrupt before the committing of any act of bankruptcy, is entitled to the proceeds of them as against the trustee, although the adjudication is prior to the sale.

Judgment of the Court below affirmed, and *Ex parte Rocke* (6 Ch. App. 775) followed.

Error from the decision of the Court of Exchequer on a special case, in favour of the defendant. (1)

Prentice, Q.C. (*E. Thomas* with him), was for the plaintiff; and *Cohen* for the defendant.

Upon *Prentice, Q.C.*, stating the question which it was proposed to raise, and that the same point had been decided since the plaintiff had brought error by Lord Hatherley, L.C., and James and Mellish, L.JJ., in *Ex parte Rocke* (2), in accordance with the view taken by the Court of Exchequer:—

Cockburn, C.J., said:—The decision of the Court of Appeal in Chancery, in *Ex parte Rocke* (2), upholds the judgment given in this case by the Court of Exchequer. From that decision we see no cause to dissent. I may add for myself, that the reasoning of my Brother Martin, in the court below, appears to me conclusive.

Willes, Blackburn, Mellor, Brett, and Grove, JJ., concurred.

Judgment affirmed

Attorney for plaintiff: *Barnett.*
Attorneys for defendant: *Cooper & Holmes.*

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(1) Reported Law Rep. 6 Ex. 228.

(2) Law Rep. 6 Ch. App. 775. 91

1872
Feb. 1.

[IN THE EXCHEQUER CHAMBER.]

BURROWS *v.* THE MARCH GAS AND COKE COMPANY.

Damages—Remoteness—Injury resulting from Two Independent Causes—Negligence—Breach of Contract or Duty—Measure of Damages.

7 C P 256 & 18 Q B D 512

The defendants, a gas company, contracted to supply the plaintiff with a proper service pipe to convey gas from the main outside to a meter inside his premises. Gas escaped from the pipe laid down under the contract into the plaintiff's shop. The servant of a gasfitter employed by the plaintiff happened to be at work in another room at the time of the escape, and went into the shop upon hearing of it with a view of finding out its cause. He was carrying a lighted candle in his hand, and immediately on entering the shop an explosion took place, doing damage to the plaintiff's stock and premises. On the trial of an action against the defendants for their breach of contract in not supplying a proper service pipe, the jury found, first, that the escape of gas was occasioned by a defect in the pipe, and that that defect existed in the pipe when supplied; and, secondly, that there was negligence on the part of the gasfitter's servant in carrying a lighted candle. Upon these findings:—

Held, affirming the judgment of the Court below, that the plaintiff was entitled to recover, and that the defendants were not relieved from liability by the negligent act of the gasfitter's servant.

APPEAL by the defendants from a decision of the Court of Exchequer discharging a rule to enter a verdict for them.

The pleadings and facts are fully stated in the report of the case in the court below. (1)

O'Malley, Q.C. (*W. Graham* with him), for the defendants, contended, first, that the negligence of Sharratt, the gasfitter's servant, deprived the plaintiff of his right to recover. Sharratt was not actually in the plaintiff's service, but he was in a position equivalent to service, and his conduct amounted to contributory negligence in the plaintiff. And, secondly, that the verdict should at any rate be for nominal damages only.

[He cited, in addition to the cases referred to below, *Harrison* v. *Great Northern Ry. Co.* (2); *Thorogood* v. *Bryan.* (3)]

Holker, Q.C. (*Merewether* with him), for the plaintiff, was not called on.

COCKBURN, C.J. We are all of opinion that the judgment should be affirmed. The action is not for negligence in its ordinary sense, but for the breach of a contract whereby the defendants promised to supply the plaintiff with a proper and sufficient service pipe from their mains to a gas meter within his premises; and the question is, whether there has been a breach of this contract. There can be no doubt that there has been a breach. The contract was not to supply a pipe which might, perhaps, be defective until it was tested, but to supply a pipe reasonably sufficient for the purpose for which it was to be used. The defendants failed to do so. The pipe they supplied was defective, and the consequence —the natural and necessary consequence—was that the gas escaped, and having so escaped, a further natural consequence was that an accident might be expected to result. Now, what can the defendants allege in defence. As I understand their contention, it is that, because the explosion which actually happened was immediately caused by the gasfitter employed by the plaintiff to test the pipe negligently using a lighted candle whilst he was trying to discover whether the pipe was faulty or not, they are exonerated. It is true, indeed, the jury found this man was guilty of negligence; but his negligence was not the plaintiff's. Neither he nor Bates, his master, were in the plaintiff's employment, but were independent tradesmen. But where a person employs one man to furnish materials, and another to do work with these materials, I cannot think that, because the second man is guilty of negligence, the first is not to be liable if the materials supplied by him were not according to contract. But that is what the defendants must contend for in this case.

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(1) Law Rep. 5 Ex. 67.

(2) 3 H. & C. 231; 33 L. J. (Ex.) 266.

(3) 8 C. B. 115.

(2) S C 10 Jur N S 992.

They appear to me to be liable upon another ground. They ought to have taken care, before laying gas on, that the apparatus of which this pipe was a part was safe and sufficient. They have thus been guilty of a double default—first, in supplying a defective pipe; and secondly, in sending gas through it in quantities calculated to produce the catastrophe which occurred. The escape of gas was the direct consequence of their breach of contract, and was necessarily dangerous. The action is therefore maintainable, and the plaintiff is entitled to recover substantial damages.

Willes, Blackburn, Mellor, Brett, and Grove, JJ., concurred.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorney for defendants: *Meredith.*

1872
Feb. 1.

[IN THE EXCHEQUER CHAMBER.]

CASTLE AND ANOTHER *v.* PLAYFORD.

7 QB 447,
451, -5,
10 CP 60, 73
— 611-2
— 617, 623,
1 App Cas 719
722-4
744-9
9 QBD 721

Vendor and Purchaser—Condition Precedent—Receipt of Bills of Lading—Delivery of Cargo—Agreement that Purchaser shall bear Risks and Dangers of the Seas.

The plaintiffs agreed with the defendant to ship on board a vessel a cargo of fresh-water ice, and to despatch the vessel with all speed to any ordered port in the United Kingdom, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof, the purchaser takes upon himself all risks and dangers of the seas;" and the defendant agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery, at the rate of 20s. a ton of 20 cwt., weighed on board during delivery. The vessel was lost during the voyage by risks and dangers of the seas, within the meaning of the agreement, and after the receipt by the defendant of the bills of lading. The plaintiffs having brought an action against the defendant to recover the value of the cargo:—

Held, reversing the judgment of the Court below, that the plaintiffs were entitled to recover.

ERROR from the decision of the Court of Exchequer in favour of the defendant on cross-demurrers to declaration and plea. (1)

The case was argued by *Philbrick* for the plaintiffs, and *Littler* for the defendant. In addition to the authorities referred to in the court below, *Taylor* v. *Caldwell* (2) was cited.

[WILLES, J., also referred to *Alexander* v. *Gardner* (3), and *Fragano* v. *Long* (4), as being in favour of the plaintiffs' contention.]

COCKBURN, C.J. In my opinion our judgment should be in favour of the plaintiffs. I am much disposed to think, though it is not necessary to decide it, that the effect of this contract was, that from the moment the cargo was shipped, and the bill of lading delivered to the defendant, the property passed. I am confirmed in that opinion by the fact that the parties introduced the clause upon which this dispute has arisen, and upon which the present question turns, namely, that from the moment the bills of lading were delivered to the defendant, he should take upon himself all the risks and perils attendant upon the conveying of the cargo by sea to the port of its destination. It seems to me that when one person says to another, "I will ship the cargo upon your account and hand you the bills of lading, (which are the indicia of the property), and give you the control of it, and you are from that moment to undertake all the risks attendant upon its transfer by sea;" it is very strong evidence that it was intended by the parties that the property in the cargo, with all its risks, should pass. However, I do not think it necessary to decide the case upon that ground—I put it only alternatively. If that is not the construction of the contract, I think the true one is this: "If you, the sellers, will undertake to ship me a cargo of ice, and to forward it by a given vessel to London, and hand me the bill of lading, so that I may have the control over the cargo, and the distribution of it, I will engage, when it arrives, to pay you according to what may be its value; and if, in the meantime, while it is upon the seas, it shall perish through the perils of the seas, I will undertake to pay you for it according to what may be estimated to have been its fair value at the time of going down." That I take to be the construction of the contract, and I do not think it was intended to make the stipulation that the cargo should be at the risk of the purchaser contingent upon the fact of the goods arriving or not in this country, which is the proposition contended for on the part of the defendant.

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(1) Law Rep. 5 Ex. 165, where the pleadings are set out at length.

(2) 3 B. & S. 826; 32 L. J. (Q.B.) 164.

(3) 1 Bing. N. C. 671.

(4) 4 B. & C. 219.

If the first construction that I have been disposed to put upon this contract is right, then, the property having passed, the stipulation as to time and mode of payment seems to have been put in merely with regard to the measure of price; but, as I have observed, I do not think it necessary to rest my view of the case upon that construction of the contract, although I entertain a strong opinion about it. It is enough that the contract is such as would be consistent with the second construction, namely, that the defendant undertook, that if the cargo should be shipped and the bills of lading transferred to him, he would pay for it according to a certain rate; and if it perished, he would pay for it according to what might be a fair estimation of its value at the time it went down.

WILLES, J., concurred.

BLACKBURN, J. My impression is, if it were necessary to decide it now, that the effect of this contract is that the property passed; but I think it is unnecessary to decide the matter. The parties in this case have agreed, whether the property passed or not, that the purchaser should, from the time he received the bills of lading, take upon himself all risks and dangers of the seas; and, according to Mr. Littler's construction, I do not see what risk he took upon himself at all, unless it was this—that he said, "If the property perishes by the dangers of the seas, I shall take the risk of having lost the property, whether it be mine or not."

The difficulty in the court below arose in reference to the alteration of the time of payment. No doubt it was afterwards provided that payment should be made on the ship's arrival and according to what was delivered. Now here, the ship and cargo have gone to the bottom of the sea; but in the cases of *Alexander* v. *Gardner* (1), and *Fragano* v. *Long* (2), it was held, that if the property did perish before the time for payment came, the time being dependent upon delivery, and if the delivery was prevented by the destruction of the property, the purchaser was to pay an equivalent sum. In the present case, when the ship went down there would be so much ice on board, and, in all probability, upon an ordinary voyage so much would have melted; and what the defendant has taken upon himself to pay is the amount which, in all probability, would have been payable for the ice. It would be the same amount as on an open insurance; and, doubtless, the merchants, in inserting this clause, were considering who were to pay the premiums of insurance for insuring the cargo, and the defendant seems to have said, "As soon as the bills of lading come to me, I will pay the premiums, or stand my own insurer." I am, therefore, of opinion that the judgment below should be reversed.

MELLOR, BRETT, and GROVE, JJ., concurred.

Judgment reversed.

Attorneys for plaintiffs: *Lumley & Lumley.*
Attorney for defendant: *E. C. Morley.*

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(1) 1 Bing. N. C. 671.

(2) 4 B. & C. 219.

[IN THE EXCHEQUER CHAMBER.]

1872
Feb. 3.

MOULE *v.* GARRETT AND OTHERS.

Assignment of Lease—Liability of ultimate Assignee to indemnify original Lessee against Breach of Covenant.

Ld 684
JCPD 57

An assignee of a lease by mesne assignments is under an obligation to indemnify the original lessee against breaches of covenant in the lease, committed during the continuance of his own tenancy; and that obligation is not affected by the covenants which the assignee may have made with his immediate assignor.

The plaintiff was lessee of certain premises under a lease containing a covenant to keep in repair. He assigned the lease to B., who assigned it to the defendants. The assignment from the plaintiff to B., and from B. to the defendants, contained express covenants with the immediate assignors respectively, to indemnify them against all subsequent breaches. Whilst the defendants were in possession they committed breaches of the covenant to keep in repair, in respect of which the lessor recovered damages from the plaintiff. In an action to recover over these damages against the defendants:—

Held, affirming the judgment of the Court below, that the plaintiff was entitled to succeed.

APPEAL from a decision of the Court of Exchequer, making absolute a rule to enter a verdict for the plaintiff.

The action was brought by the original lessee of certain premises, to recover from the defendants, the ultimate assignees of the term, a sum of money which the plaintiff had been compelled to pay to the lessor, in respect of dilapidations which occurred during the tenancy of the defendants.

At the trial a verdict was entered for the defendants, with leave to the plaintiff to move to enter a verdict for him for 75*l.*, if the Court should be of opinion that, upon the evidence, he was entitled to succeed. This rule was obtained, and was, after argument, made absolute by the Court of Exchequer (Channell and Pigott, BB.; Cleasby, B., dissenting). (1) The defendants appealed.

The facts and pleadings are fully stated in the report of the case in the court below.

R. D. Bennett (*Manisty, Q.C.*, with him), for the defendants. In order to make a defendant liable upon a covenant, there must be either privity of contract or privity of estate with the plaintiff:

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(1) Law Rep. 5 Ex. 132.

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MOULE v. GARRETT.

Platt on Covenants, p. 493. Here the defendants were liable to their assignor by virtue of privity of contract, and to the lessor by virtue of privity of estate; but between them and the plaintiff there is privity neither of contract nor of estate. The authorities on which the plaintiff relies are the dictum in *Wolveridge* v. *Steward* (1) and the case of *Burnett* v. *Lynch.* (2) But the latter case differs from this in the essential circumstance, that there the defendant was the immediate assignee of the plaintiff, and the decision is founded upon this fact: see per Abbott, C.J., and Bayley, J. (3)

[BLACKBURN, J. That certainly cannot be said of the judgments of Holroyd and Littledale, JJ. (4); and the reasoning of all the judgments is quite as applicable where the defendant takes from the plaintiff through mesne assignments as where he takes directly.]

The reasoning would also apply to the case of an under-lessee.

[BLACKBURN, J. No; because the under-lessee has never come under any obligation to the lessor; but here the defendant, by taking the same estate which the plaintiff had, has become liable to the same obligation.]

It was for the plaintiff to protect himself by taking proper covenants from his assignee; and he has in fact taken such covenants from Bartley.

[BLACKBURN, J. That is a very imperfect remedy; the immediate assignee may become bankrupt.]

If the plaintiff's contention is well founded an ultimate assignee might become liable, who had expressly entered into limited covenants with his assignor.

[BLACKBURN, J. Why not? How can he alter his obligation to the lessee by his contract with another person? He cannot protect himself from liability to the lessor; why should he any the more be able to protect himself from liability to the lessee?]

To maintain the plaintiff's claim it must be shewn that he is surety for the defendants; that is the ground on which it is put in the dictum in *Wolveridge* v. *Steward.* (5) But his position is not that of surety, for he is the person originally liable to the lessor.

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(1) 1 C. & M. at p. 659.

(2) 5 B. & C. 589.

(3) 5 B. & C. at pp. 601, 604.

(4) 5 B. & C. at pp. 606, 608.

(5) 1 C. & M. at p. 659.

[WILLES, J. Nevertheless he comes within the general principle, that where two persons are under an obligation to the same performance, though by different instruments, if both share the benefit which forms the consideration they must divide the burden; if one only gets the benefit he must bear the whole: *Dering* v. *Earl of Winchilsea.* (1)

BLACKBURN, J. *Humble* v. *Langston* (2) was later than *Wolveridge* v. *Steward* (3), and it therefore adds weight to the dictum in the latter case, especially as Parke, B., who delivered the judgment in *Humble* v. *Langston* (2) was a member of the Court which decided *Wolveridge* v. *Steward.* (3)]

Cole, Q.C. (*Merewether* with him), for the plaintiff, cited *Penley* v. *Watts* (4) and *Neale* v. *Wyllie.* (5) [He was stopped.]

COCKBURN, C.J. I am of opinion that the judgment of the Court of Exchequer is right, and that it must be affirmed. The defendants are the ultimate assignees of a lease, and the plaintiff, who is suing them for indemnity against the consequence of a breach of a covenant contained in that lease, is the original lessee. There is no doubt that the breach of covenant is one in respect of which the defendants, as such assignees, are liable to the lessor, and that they have acquired by virtue of mesne assignments the same estate which the plaintiff originally took. And I think that taking this estate from the assignee of the plaintiff, their own immediate assignor, they must be taken to have acquired it, subject to the discharge of all the liabilities which the possession of that estate imposed on them under the terms of the original lease, not merely as regards the immediate assignor, but as regards the original lessee.

Another ground on which the judgment below may be upheld, and, as I think, a preferable one, is that, the premises which are the subject of the lease being in the possession of the defendants as ultimate assignees, they were the parties whose duty it was to perform the covenants which were to be performed upon and in respect of those premises. It was their immediate duty to keep

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(1) 2 B. & P. 270.
(2) 7 M. & W. 517.
(3) 1 C. & M. 644.
(4) 7 M. & W. 601, 608.
(5) 3 B. & C. 533.

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in repair, and by their default the lessee, though he had parted with the estate, became liable to make good to the lessor the conditions of the lease. The damage therefore arises through their default, and the general proposition applicable to such a case as the present is, that where one person is compelled to pay damages by the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the sum so paid. This doctrine, as applicable to cases like the present, is well stated by Mr. Leake in his work on Contracts, p. 41: "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."

Whether the liability is put on the ground of an implied contract, or of an obligation imposed by law, is a matter of indifference: it is such a duty as the law will enforce. The lessee has been compelled to make good an omission to repair, which has arisen entirely from the default of the defendants, and the defendants are therefore liable to reimburse him.

8 QB 462

WILLES, J. I am of the same opinion, on the ground that where a party is liable at law by immediate privity of contract which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant; the former is entitled to be indemnified by the latter in respect of the performance of the obligation.

BLACKBURN, J. I am of the same opinion, for the reasons given by my Brother Channell in the court below.

MELLOR, BRETT, and GROVE, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Robinson & Preston.*
Attorney for defendant: *H. D. Roberts.*

[IN THE EXCHEQUER CHAMBER.]

1872
Feb. 4, 5.

PICKWELL *v.* SPENCER AND OTHERS.

Will before 1838—*Fee given without Words of Limitation.*

By a will, dated before 1838, the testator gave lands to his wife without words of limitation. He also made her executrix and general legatee. And (1) he provided that if his wife should marry again, an inventory should be taken of all the land, goods, &c., before mentioned by certain persons, whom he appointed guardians of his children, with power to take away the goods, &c., and to "reserve" them and the land for the benefit of his children, until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole, and divide the proceeds equally amongst his surviving children; (2) he directed that "my executrix shall pay my eldest son W. P. the sum of 5*l.* a year for wages so long as he shall continue to labour on the farm after my decease:"—

Held, affirming the judgment of the Court below, that the widow took the fee.

By Cockburn, C.J., Willes, and Grove, JJ., on the ground that clause 1 disclosed an intention that she should take the fee, subject to the limitation over on her marrying again.

By Blackburn, J., on the ground that the direction to pay 5*l.* a year to W. P. in clause 2 enlarged the estate to a fee.

By Mellor and Brett, JJ., on both grounds.

ERROR brought by the plaintiff upon the judgment of the Court of Exchequer in favour of the defendants, on a special case stated in an action of ejectment.

The plaintiff claimed copyhold land as customary heir to Matthew Pickwell, who, by his will dated the 26th of March, 1821, devised as follows:—"I give and bequeath to my beloved wife, Mary Pickwell, all those my copyhold closes, which I have surrendered to the use of my will, situate, &c. I also give and bequeath to my said wife, Mary Pickwell, all the land which may fall to the said closes by the inclosure of the High Moor. Also I give and bequeath to my said wife, Mary Pickwell, all my money, goods, chattels, and effects, of what nature or kind soever and wheresoever the same shall be at the time of my decease. And I do nominate, &c., my said wife executrix of this my last will." The testator then directed that "if my said wife, Mary Pickwell, marry again," an inventory should be taken of all the land, goods, &c., before mentioned by certain persons, whom he appointed guardians of his children, with power to take away the goods, chattels, and effects, and to "reserve" them and the land for the benefit of his children, until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole and divide the proceeds "equally amongst my surviving children. It is also my will that my executrix shall pay my eldest son, William Pickwell, the sum of 5*l.* a year for wages as long as he shall continue to labour on the farm after my decease."

The testator died shortly after making his will. In 1832 Mary Pickwell sold the lands in question to Richard Snow, who died in 1857, having devised them to trustees for his wife during her life, and after her death to the defendants, as tenants in common.

Richard Snow's widow died, and the defendants were admitted in 1865.

Mary Pickwell died in 1870, without having married again. The question for the opinion of the Court was, whether Mary Pickwell took any larger estate in the land than a life estate.

The Court below gave judgment for the defendants (1), and the plaintiff brought error.

Field, Q.C. (*J. J. Aston* with him), for the plaintiff. It cannot have been the intention of the testator to put it in the power of his wife to alienate this property, which he has expressly limited over in the event of her marriage.

[BLACKBURN, J. The title of the purchaser would be a defeasible title.]

The evidence of intention to benefit his children by the devise is so strong that it cannot be supposed the testator should be willing that in any case the land should be alienated from them.

[COCKBURN, C.J. But by your construction the testator will not benefit his children in the event which has happened, but will only benefit his heir.

GROVE, J. In effect the testator disinherits his heir if his wife marries, but not if she dies.]

It is not necessary for the plaintiff to shew an intention not to confer an estate in fee on the widow; on the contrary, it is for those claiming under her to shew an intention to disinherit the heir. Two grounds are relied on in favour of the defendants.

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(1) Law Rep. 6 Ex. 190.

First, it is contended that the limitation over in the event of marriage implies a gift of the fee in the alternative event. But this is an inference only made where the one alternative is that of death under twenty-one; and the rule is not extended to any other cases: 2 Jarman on Wills, 3rd ed., p. 251. [*Field* also argued, on the authority of *Browne* v. *Hammond* (1), that a limitation over of the fee to "the trustees for the benefit of all the children," was to be implied upon the death of the widow unmarried; but the Court pointed out that the case had no application, for that there the first limitation was expressly of an estate durante viduitate; and it was suggested that, even if it applied, the heir would have no title to maintain this action, and Willes, J., referred to *Brown's Case*. (2)] Secondly, and this is the ground relied on in the judgment of the Court below, it is contended that the direction to the widow to pay 5*l*. a year to William Pickwell enlarges her estate to a fee. But this is not so, for the charge is not on her as devisee, but on her as executrix; it is in terms a direction to his "executrix," and the accident that his executrix is also his devisee will not suffice to support the inference: 2 Jarman on Wills, 3rd ed., p. 249; Hawkins on Construction of Wills, p. 134. He also referred to *Roe* v. *Blackett* (3); *Lloyd* v. *Jackson* (4); *Moone* v. *Heaseman*. (5)

Manisty, Q.C. (*F. M. White* with him), for the defendants, was stopped.

Cockburn, C.J. I am of opinion that the judgment of the Court below should be affirmed; but I cannot say that I come to that conclusion upon the same grounds as those on which the judgment below proceeded. I cannot bring my mind to be satisfied that in that part of the will which provides that the testator's executrix shall pay the sum of 5*l*. yearly to his son, the words amount merely to a designatio personæ. I quite agree with the proposition stated in 2 Jarman on Wills, 3rd ed., p. 249, that if there is a devise which would operate only as a devise for life, but a pecuniary charge is attached to the devise, the fact that the devisee on whom the charge is imposed in his character of devisee is afterwards appointed executor, will not make the payment a payment by him as executor, and the devise will therefore enure to his benefit so as to enlarge the fee. But the case differs where the direction to pay is given not to the devisee as such, but to the devisee under the name of executor; there the charge seems rather imposed on him quâ executor, and not quâ devisee.

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(1) Johns. 210.

(2) 4 Rep. 21 a. (No. 1 of the *Copyhold Cases.*)

(3) 1 Cowp. 235.

(4) Law Rep. 2 Q. B. 269.

(5) Willes, 138.

But, construing this will as a whole, I am of opinion that the true construction is, that it gives an estate in fee to Mary Pickwell. No doubt, in a will prior to 1838, if there are no words to indicate the nature of the interest given, a devisee will take only an estate for life; but, on the other hand, the rule is equally well established, that if you can gather from the rest of the will that the testator did not intend to give merely an estate for life, the gift will be enlarged to a fee. Now here the intention of the testator manifestly was that his wife should remain single. According to the plaintiff's construction the youngest son would, in that event, have taken the whole of the realty as customary heir, to the exclusion of the other children. But it is quite plain that in the disposition of his property, which the testator proposed to make in the event of his wife marrying again, he meant to distribute the property among all his children, share and share alike. This then was the distribution which he desired to take effect, and it cannot be doubted that this was also what he desired and expected his wife to do in the event of her remaining single, and so having no collateral or sinister influence brought to bear upon her in the distribution of the family estate. Nothing is more common than for a man to leave his property in the first instance absolutely to his wife, trusting to her to make such a disposition of it in after years, with reference to the state of things which may then have supervened, as he would have made if he survived her, securing his family at the same time against the possibility of her putting herself into a condition where she cannot be safely trusted to perform that duty. That is what the testator here intended. He meant to leave to his wife the entire disposition of the property, in such manner and under such conditions as she thought fit; but, in the event of her marrying again, he makes himself such a disposition as he trusted she would have made if she had remained single. That being his manifest intention, it would be entirely defeated if the wife took only an estate for life, in which event his heir would, upon her death without marrying, get the whole. Therefore, although the devise to the wife is without words of limitation, yet on the whole will it is evidently intended that she shall take an estate in fee, subject only to be divested upon the event of her marrying again.

WILLES, J. I am of the same opinion.

BLACKBURN, J. I also am of opinion that the judgment should be affirmed. The case has been argued on several grounds, but I rest my judgment on one only. Upon the others, if it were necessary, I should desire time to inquire further into the authorities. The will being prior to 1838, it is well established that, the devise being of the land only, without words of limitation, the devisee would primâ facie take for life only; but it is equally well established that, when a devise of lands is made in this form, and the testator proceeds to express an intention that the object of his bounty should pay a sum of money, his having imposed on the object of his bounty a charge which, if only a life estate were given, would be a loss, affords a sufficient indication of his intention that the devisee should take not for life, but in fee. And this is obviously just where the value of the life estate would be small in proportion to the amount of the charge. But it is also established that the Court will not take into consideration the proportion of value of the life estate and the charge; and whatever the ground of this may have been originally, there is one very satisfactory reason for it. In matters of conveyancing it is a great object to make the law such that men may know whether they have a good or a bad title; and if they had to inquire whether the charge imposed by the will upon the devisee through whom they claim was large or small in proportion to the value of the life estate, no one claiming under such a devisee could be certain of his title. Therefore, for the security of title, there is good reason for holding that this is not to be taken into account.

The argument, however, fails if the gift is simply a legacy; and if Mr. Field could have persuaded me that the gift of 5*l.* yearly to William Pickwell was a mere legacy, which he would get only out of the personal assets, and the payment of which was not charged personally on the widow, I should agree that this gift would not affect the devise. But I cannot construe the will so. The testator devises and bequeaths everything to his wife, and then makes her his executrix. He afterwards directs that his "executrix" shall pay this sum of money yearly to his son. I think the word "executrix," as here used, is merely a description of his wife, and that the yearly sum of 5*l.* is a charge upon her personally, and not a legacy to be paid out of his personal estate. It follows that the estate given to her is enlarged to a fee.

Mellor, J. I am of the same opinion, both on the ground stated by my Brother Blackburn, and relied upon in the court below; and also because I agree that, for the reasons assigned by the Lord Chief Justice, it was the manifest intention of the testator to pass the fee to his wife.

Brett, J. I think the judgment should be affirmed on both grounds. The will discloses an intention on the part of the testator to benefit all his children, and one mode in which he seeks to protect their interests is by preventing his wife from marrying again. But if Mr. Field's argument is correct, this result would follow, that it would be more to the benefit of his children that she should marry than that she should not.

On the other ground also I think the estate is enlarged to a fee. The property being given without words of limitation, a charge is afterwards imposed on the executrix; but it seems to me that that charge is imposed on her in consequence of the devise to her of the copyhold lands, which we must take to have formed a part of the farm. That also shews that his wife was intended to take the fee.

Grove, J. I agree. There is an inconsistency upon the one construction, and not upon the other. The testator has provided for all his children in the event of his wife's marrying, but not in the event of her dying unmarried. If he meant that, in that event, the heir should take all, there would be an inconsistency in his intention. But it is consistent that he should leave his wife to provide for that event; and this is more probable than that he should have had an inconsistent intention.

Judgment affirmed.

Attorneys for plaintiff: *Swann & Co.*

Attorneys for defendants: *Borrett, White, & Borrett.*

[IN THE EXCHEQUER CHAMBER.]

1872
Feb. 8.

FROST *v.* KNIGHT.

Breach of Promise of Marriage—Breach of Contract by refusal to perform, the Time for Performance not having arrived.

The defendant promised to marry the plaintiff so soon as his (defendant's) father should die. During the father's lifetime the defendant refused absolutely to marry the plaintiff. The plaintiff sued for breach of the promise, the defendant's father being still alive.

Held, reversing the judgment of the Court below, that the principle of *Hochster* v. *De la Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455) was applicable to the case of such a promise to marry, and that a breach of contract had been committed on which the plaintiff could sue.

7 QB 374-7
7 Ex [illegible] —
8 CP 173-
180-2-4
9 CP 593
10 CP 600
1 QBD. 6

Error on a judgment of the Court of Exchequer (Kelly, C.B., and Channell, B.; Martin, B., dissenting), arresting the judgment after a verdict for the plaintiff. The facts and pleadings in the case are stated in the judgment of the Lord Chief Justice, and more fully in the report of the case below. (1)

June 20, 21, 1871. The case was argued by

Hill, Q.C. (*Dodd* with him), for the plaintiff.

Powell, Q.C. (*Streeten* with him), for the defendant.

The same arguments were used and cases cited as in the court below.

Cur. adv. vult. (2)

Feb. 8, 1872. The following judgments were delivered:—

Cockburn, C.J. (3) This case comes before us on error, brought on a judgment of the Court of Exchequer arresting the judgment in the action on a verdict given for the plaintiff.

The action was for breach of promise of marriage. The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for

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(1) Law Rep. 5 Ex. 322.

(2) The case was heard before Cockburn, C.J., and Byles, Montague Smith, Keating, and Lush, JJ.; but before the judgment was delivered Montague Smith, J., had ceased to be a member of the Court.

(3) In this judgment Keating and Lush, JJ., concurred.

(4) S C 17 Jur 972

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FROST
v.
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the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule nisi was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event, no claim for performance could be made, and, consequently, till its occurrence, no action for breach of the contract be maintained. A rule nisi having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin, B., dissenting; and the question for us is, whether the judgment of the majority was right.

The cases of *Lovelock* v. *Franklyn* (1) and *Short* v. *Stone* (2), which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil it, an action will at once lie. The case of *Hochster* v. *De la Tour* (3), upheld in this court in the *Danube and Black Sea Co.* v. *Xenos* (4) went further, and established that notice of an intended breach of a contract to be performed in futuro had a like effect.

8CB177

The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster* v. *De la Tour* (3) and *The Danube and Black Sea Co.* v. *Xenos* (4) on the one hand, and *Avery* v. *Bowden* (5), *Reid* v. *Hoskins* (6), and *Barwick* v. *Buba* (7) on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

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(1) 8 Q. B. 371.

(2) 8 Q. B. 358.

(3) 2 E. & B. 678; 22 L. J. (Q.B.) 455. 17 Jur 972

(4) 13 C. B. (N.S.) 825; 31 L. J. (C.P.) 284.

(5) 5 E. & B. 714; 26 L. J. (Q.B.) 3.

(6) 6 E. & B. 953; 26 L. J. (Q.B.) 5.

(7) 2 C. B. (N.S.) 563; 26 L. J. (C.P.) 280.

(5) & (6) S C 3 Jur NS 238,

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On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

Considering this to be now settled law, notwithstanding any thing that may have been held or said in the cases of *Philpotts* v. *Evans* (1) and *Ripley* v. *McClure* (2), we should have had no difficulty in applying the principle of the decision in *Hochster* v. *De la Tour* (3) to the present case, were it not for the difference which undoubtedly exists between that case and the present, viz., that, whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, namely, the death of the defendant's father during the lifetime of the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself, before the time of performance arrives; but here we have a further contingency depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise.

After full consideration we are of opinion that, notwithstanding the distinguishing circumstance to which I have referred, this case falls within the principle of *Hochster* v. *De la Tour* (3), and that, consequently, the present action is well brought.

The considerations on which the decision in *Hochster* v. *De la Tour* (3) is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach, and that it is for the common benefit of both parties that the contract shall be taken to be broken as to all its incidents,

(1) 5 M. & W. 475.
(2) 4 Ex. at p. 359.
(3) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

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including non-performance at the appointed time; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

It is true, as is pointed out by the Lord Chief Baron, in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in *Hochster* v. *De la Tour* (1) proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be ad-

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(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455. 17 Jan 972

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mitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfilment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

It appears to us that the foregoing considerations apply to the case of a contract the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time; and we are, therefore, of opinion that the principle of the decision of *Hochster* v. *De la Tour* (1) is equally applicable to such a case as the present.

It is next to be observed, that the law as settled by *Hochster* v. *De la Tour* (1) and *Danube and Black Sea Company* v. *Xenos* (2) is obviously quite as applicable to a contract in which personal status or personal rights are involved, as to one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed in futuro. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman, more especially, it is all-important that the relation shall not be

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(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

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(2) 13 C. B. (N.S.) 825; 31 L. J. (C.P.) 284.

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put an end to. Independently of the mental pain occasioned by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions; nor could she admit of such approaches, if made; while the breaking off of the engagement is too apt to cast a slur upon one who has been thus treated. We see, therefore, every reason for applying the principle of *Hochster* v. *De la Tour* (1) to such a case, and for holding the contract, if repudiated, to be broken, not only in its present, but also in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury, by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that the desire of marrying and the happiness to be expected from it diminish with advancing years, and, therefore, that when by the terms of the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished; and that, consequently, an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We think that, in estimating the amount of injury done and of the compensation to be made for it, if the contract were broken when the time for marrying had arrived, the wasted years and the impossibility of forming any other engagement during the intermediate time should be taken into account, and not merely the age of the parties and the then existing value of the marriage. It is, therefore, manifest that it is better for both parties—for the party intending to break the contract, as well as for the party wronged by the breach of it—that an express repudiation of the contract should be treated as a violation of it in all its incidents, and should give the right to the party wronged to bring an action at once, and have the damages

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

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assessed at the earliest moment. No one can doubt that, morally speaking, a party who determines to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise has come. The reason is, that the giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates, the injury to the party wronged.

It has been urged that there must be great difficulty in thus assessing damages prospectively. But this must always be more or less the case whenever the principle of *Hochster* v. *De la Tour* (1) comes to be applied. It would equally exist where one of the parties, by marrying another person, gave rise, as in the case of *Short* v. *Stone* (2),to an immediate right of action. It cannot be said that the difficulty is by any means insuperable, and the advantages resulting from the application of the principle of *Hochster* v. *De la Tour* (1) are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages.

We are struck by the fact that the Lord Chief Baron, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. But as the rights and obligations of the parties arise here entirely out of the contract, we have a difficulty in seeing how such an action could be maintained. But be that as it may, as in such an action as is thus suggested the damages would have to be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simpler course, the case being, as it seems to us for the reasons we have given, clearly within the decision in *Hochster* v. *De la Tour* (1), to hold that the present action for breach of the contract may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the nonfulfilment of the promise as though the death of the defendant's father—the event on which the fulfilment was to depend—had actually occurred.

We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(2) 8 Q.B. 358.

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Byles, J. I think the plaintiff below entitled to recover, both on principle and on authority, but as my judgment was prepared before I had the advantage of seeing that of the Lord Chief Justice, and as this is a case of great importance, I think I ought to deliver it.

An express pre-contract of marriage, as already suggested by the Lord Chief Justice, places the man and woman in the condition or status of betrothment. In this state there are certain mutual duties. The woman, for example, may not, without a breach, marry another man, although it is possible that he may die before the future day appointed for the first intended marriage, whether already fixed, or whether contingent on a future event. So I conceive the man cannot, during the stipulated period of betrothment, without a breach of contract, marry another woman, though she may die in the mean time. So, for one of the parties to break off the mutual engagement by an express refusal to perform it, though before the day, seems to me to be equally a breach of the contract, for it puts an end to the condition of betrothment which, according to the contract, was to continue. In each of these three cases there is a repudiation of the duties springing from the new relation involved in the contract.

But, independently of the peculiarities attending a pre-contract of marriage, the decision in *Hochster* v. *De la Tour* (1) shews that in the analogous case of a pre-contract for future service, the refusal of one of the parties to perform the contract, though before the time appointed for its fulfilment, is a breach. And the decision in that case goes further than is necessary for our decision in this case. For there no status had been established like that involved in a pre-contract of marriage.

But the Court of Common Pleas, in the case of *Wilkinson* v. *Verity* (2), and the Court of Error, in *Danube and Black Sea Company* v. *Xenos* (3), affirming the judgment of the Court below, have laid it down that an absolute unconditional renunciation of a contract before the time of performance amounts to a breach, though only at the election of the promisee.

Judgment reversed.

Attorneys for plaintiff: *Pitman & Lane.*

Attorneys for defendant: *Austen, De Gex, & Harding.*

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(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455.

(2) Law Rep. 6 C. P. 206.

(3) 13 C. B. (N.S.) 825; 31 L. J. (C.P.) 284.

THE BRITISH AND AMERICAN TELEGRAPH COMPANY *v.* THE ALBION BANK.

1872
Jan. 20.

8Ch 1045
1049, 105
1052-5, 1060,
10QB. 492
1QBD, 70
21ChD 494

Money received—Fraud—Sham Allotment of Shares—Contrivance to procure Settling Day—Restoration of Money actually paid by Innocent Parties—Estoppel.

The plaintiffs, a telegraph company, invited applications for shares, received some in the ordinary way and allotted some, on which deposits were paid. The number allotted was, however, insufficient to procure a settling day on the Stock Exchange, and some of the directors of the company, S., the promoter, and C., the defendants' manager, agreed, in order that the defendants might certify to the committee of the Stock Exchange, the requisite amount of shares to have been subscribed, that an account should be opened in S.'s name with the defendants, and another account in the plaintiffs' name; that the plaintiffs should guarantee to the defendants the repayment of any money drawn by S., and charge with such repayment any balance in their favour; that the defendants should have a bonus of 600*l.*, and C. of 1000*l.*; that S. should get persons to apply for shares, which should be duly allotted, and should draw on his account for, and pay into the plaintiffs' account the requisite deposits, taking blank transfers from the pretended allottees. This plan was carried out. Accounts were opened, that in the plaintiffs' name with 1500*l.* really paid in; that in S.'s name with a loan of 1500*l.* from the defendants. Sham applicants were obtained by S., and shares allotted to them. S. thereupon drew on his account, and with the proceeds paid the requisite deposits into the plaintiffs' account. The pretended allottees, immediately after the shares were allotted, handed blank transfers to S. Finally the plaintiffs' account with the defendants stood with a credit of 24,505*l.* 18*s.* 6*d.*, made up of the 1500*l.* really paid in and the pretended deposits. S.'s account stood with a debit of 24,506*l.* 8*s.* 4*d.*, made up of the sums he had drawn and the 1500*l.* loan. No settling day was ever granted; and the plaintiffs' company afterwards went into liquidation under a winding-up order. In an action by the plaintiffs to recover the whole amount to their credit, the defendants paid their bonus of 600*l.* into court, and denied liability as to the residue:—

Held, that the plaintiffs were entitled to the 1500*l.* actually paid by them to the defendants, but to no more; and that judgment must therefore be given for them for 900*l.*

Gray v. *Lewis* (Law Rep. 8 Eq. 526) distinguished.

THIS was a special case, in which the question was whether the plaintiffs were entitled to recover from the defendants a balance of 23,905*l.* 18*s.* 6*d.* The facts are fully stated in the judgment of the Court.

1871. June 20. *J. Brown, Q.C.* (*Holl* with him), for the plaintiffs, relied on *Gray* v. *Lewis* (1), contending, on that authority, that the

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(1) Law Rep. 8 Eq. 526.

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BRITISH AND AMERICAN TELEGRAPH COMPANY *v.* ALBION BANK.

plaintiffs were entitled to recover from the defendants the whole amount standing to their credit. At all events they were entitled to the 1500*l.* actually paid by them to the defendants.

Pollock, Q.C. (*R. G. Williams* with him), for the defendants. The money sought to be recovered consists (*a*) of 1500*l.* actually paid, and (*b*) the residue of the amount standing to the plaintiff's credit. As to the latter sum, it cannot be recovered, for it never was in truth the plaintiffs' money: *Nicholson* v. *Gooch* (1); *Brownrigg* v. *Rae* (2); and as to the former sum, it cannot be severed from the latter. The plaintiffs cannot affirm their directors' conduct in one particular, and repudiate it in another.

J. Brown, Q.C., in reply. Money received will lie, at any rate for the 1500*l.*: Bullen & Leake's Precedents of Pleading, 3rd ed., 37 (n); Chitty on Contracts, 6th ed., 562.

Cur. adv. vult.

Jan. 20. The judgment of the Court (Bramwell, Channell, and Pigott, BB.) was delivered by

BRAMWELL, B. It will be convenient to state the facts of this case, to shew how we appreciate them. The plaintiffs' company is now in liquidation under a winding-up order. It was formed, probably bonâ fide, for the purpose indicated by its name. It invited applications for shares, received some in the usual way, and allotted some shares on which deposits were paid; but not enough to enable it to procure a settling-day for its shares on the Stock Exchange. This being thought desirable, in order to make the public apply for or purchase shares, the following plan was resolved on: The directors of the plaintiffs' company, or some of them, Stafford, the promoter of the company, and Challis, the general manager of the defendants, agreed that an account should be opened in Stafford's name with the defendants; that another account should be opened with them in the name of the plaintiffs; that the plaintiffs should guarantee to the defendants the repayment of any money, with interest, drawn by Stafford on the account in his name, and charge with such repayment any balance in their favour on the account in their name; that the defendants should have a bonus of 600*l.* for this; that Stafford should then get persons to apply for shares, which the directors of the plaintiffs should allot to them; that Stafford should draw on the account in his name with the defendants, and with the money thereby obtained pay into the plaintiffs' account with the defendants the requisite deposits on the allotments, taking blank transfers from the allottees or pretended allottees. Challis was to have a bribe of 1000*l.*, and there were to be various other persons to be rewarded. The object of this was that the defendants' bank might certify to the committee of the Stock Exchange that the requisite amount of shares to get a settling-day had been applied for and paid in. This plan was carried into execution. The accounts were opened. That in the plaintiffs' name with a payment in of 1500*l.* of the plaintiffs' money. That in Stafford's name with a loan or advance of 1500*l.* from the defendants. Persons were procured by Stafford and one of the directors of the plaintiffs' company, to apply or pretend to apply, and to sign letters of application for shares. Shares were allotted by the directors of the plaintiffs, or some of them thereon. Stafford drew on the account in his name, and with the proceeds of such drawings paid into the account in the plaintiffs' name the requisite deposits. Sometimes he paid in the identical notes he received, sometimes change he had procured for them at the bank, and sometimes it was managed otherwise. But he never kept for twenty-four hours any of the money he drew; and when it was thought desirable he should go to Paris and seek shareholders, and that 6000*l.* should be sent there to pretend to pay their deposits, a clerk of the defendants was sent with the money for that purpose, Challis probably not being willing to trust Stafford with so large a sum. The bonâ fide real bankers of the plaintiffs were Dimsdale & Co. and the London and County Bank. The allottees, or pretended allottees, so procured were real persons, but, as we were informed, wholly incapable of paying the amounts of the shares allotted to them, and without any intention of really being shareholders. They immediately handed their letters of allotment and blank transfers to Stafford. In the result the plaintiffs' account with the defendants stood with a credit of 24,505*l.* 18*s.* 6*d.*, made up of the real 1500*l.* paid in, and the deposits or pretended deposits so paid in by Stafford, less a trifle for stamps. Stafford's account, on the other hand, stood with a debit of 24,506*l.* 8*s.* 4*d.*, made up of

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(1) 5 E. & B. 999; 25 L. J. (Q.B.) 137.

2 Jur N.S. 303.

(2) 5 Ex. 489.

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the sums he had drawn or purported to draw to pay the deposits, and of the 1500*l.*, which he drew out, partly to pay the 600*l.* bonus to the defendants, who have received it, partly for himself, partly for some of his confederates, and partly for the purposes of the scheme. The defendants have debited the plaintiffs' account with this amount, and say nothing is due to them. They have, however, paid into court the 600*l.* they had reserved for themselves, and the question now is, whether the plaintiffs are entitled to recover the whole or any part of the balance of 23,905*l.* 18*s.* 6*d.*

10 QB 492

Now it is necessary for the purposes of our judgment, and right that it may not be supposed our opinion is otherwise, that we should say that the scheme we have mentioned was fraudulent and illegal, and brought the parties to it within the criminal law; and we must equally regret and wonder that gentlemen of character and position could have been parties to it, a thing we can only account for by supposing some extraordinary self-deception. This being the case, of course the plaintiffs are not bound by what was agreed to on their behalf. The act of the directors who were parties to it was void, and bound the plaintiffs' company as little as though it had been entered into by the plaintiffs' secretary or messenger. And as the facts were known to their manager, Challis, the defendants have notice of the illegality and invalidity of the transaction. On the other hand, the defendants are bound to refund any money they have received; because although Challis had no authority to bind them to any such contract as he entered into, yet if the defendants received the plaintiffs' money under it, the plaintiffs (though not their directors) being innocent parties, the defendants must refund it. If A., the clerk of B., without B.'s authority, pays money into the bank of C., having previously made an arrangement with D., the clerk of C., for some application of that money, which neither A. nor D. had authority from their masters to make, C. must refund to B. It seems to us clear, therefore, that the plaintiff must recover the 900*l.*, balance of the 1500*l.*, of the plaintiffs' real money paid into the defendants' bank. The defendants have received that money—what right have they to retain it? None, unless under the guarantee. But that guarantee is not binding on the plaintiffs. For this reason then our judgment must be for the plaintiff for that sum.

It remains to consider the other amount. Now as to that;—the defendants never received any money which they were to pay to the plaintiff. We are not referring to any special pleading matter of money had and received, or money lent; but in substance and reality the defendants never had any of the plaintiffs' money, or money for the plaintiffs, except the £1500. Treating the contract as valid, if the plaintiffs had demanded any of the money nominally standing to their credit, the defendants would have said "That sum is charged with your guarantee; you have no right to it;" and that would have been an answer. Treating it as invalid, the plaintiffs in effect say, "We opened no account with you; we gave you no authority to receive money on account;" and if they add, "But you have done so, and we elect to take it," the answer would be, and would truly be, "No money has been paid to us, or received by us to be paid by us to you absolutely, but only conditionally and subject to our lien for Stafford's balances." Let us suppose that, instead of the directors being parties to this scheme, it had been done by the secretary or manager, or by Stafford alone. How, then, could the plaintiffs have claimed this money, except subject to the conditions and on the terms on which Stafford paid it in and the defendants received it? But the case is the same though some or all the plaintiffs' directors are parties to the scheme.

If the defendants are liable to pay to the plaintiffs any of this money, it must be because they have made a contract with them, or some one else, that they, the defendants, would pay them, the plaintiffs, the money; but they have made no such contract. If, therefore, the realities are only looked at, it seems to us the plaintiffs could not recover this sum. But the case was put in another way. It was put as an estoppel. It was said, "We the plaintiffs have allotted 11,506 shares, and you the defendants have signed certain deposit receipts to the amount of 23,006*l.*, therefore they are shareholders, who are entitled to say as against us, that they are shareholders entitled to all rights and benefits as such; that they have paid 23,006*l.*, which our agents the bank acknowledge they have received; therefore we the plaintiffs say, you the defendants are estopped from saying you have not received that amount. But it seems to us this is not so. We think no allottee under the scheme could have claimed to be a shareholder. In all the cases Stafford was the allottees' agent in the matter, and his knowledge of the fraud and invalidity would affect the allottees. May be, the plaintiffs could ratify what had been done, and treat the allottees as such; but then they must ratify in toto, and their doing so would be voluntary. They are not *bound* by the defendants' acts, but would, if they adopted them, do so because they chose to adopt and take advantage of them. Further, without wishing needlessly to prejudge any matter, it seems to us that these allottees cannot say they have paid their deposits. They applied for shares; it may be there was some director or directors who, not knowing of this scheme, made the allotment, which would therefore be valid. Then the allottee being liable, employs Stafford to pay his deposit, and undoubtedly the letter of allotment says it may be paid at the defendants' bank. But that, in the mind of an innocent director and an innocent allottee, would mean to an ordinary account really to the credit of the plaintiffs, and which the plaintiffs might draw on. But the deposit money is paid by Stafford, the allottee's agent, to the defendants, and received by them so far as it is paid and received, not really on the account and for the benefit of the plaintiffs, but for that of Stafford and the defendants. It seems to us, therefore, that these allottees cannot say they have paid their deposits. But, further, if they can, they have done so by borrowing money of the plaintiffs or of Stafford. If of the plaintiffs, they owe it to them in a different form. If of Stafford, they owe him, and he owes the plaintiffs; and though that owing may be of small value, the plaintiffs cannot be entitled to the money twice—once from the defendants, once from Stafford.

It seems to us, then, that the plaintiffs are not entitled to recover this sum. It would be hard upon the defendants if they could. The defendants' manager has behaved very ill, and ought to be punished; but the directors are acquitted by the arbitrator of any complicity with him, though we cannot but think it wonderful their suspicions should not have been aroused by so unusual a transaction, if, indeed, they attend to their duties. But why should their shareholders suffer? Why should the plaintiffs make an enormous profit out of this fraud, as they will if they recover?

Because, suppose the allottees should claim a dividend, suppose one was payable, how could they make out their case? Even if they could, the losses of the company will be distributed over 13,830 shares, instead of over 2324, and that by virtue of an illegal and fraudulent transaction which the plaintiffs repudiate (1); fraudulent shareholders will be entitled to claim dividends; or if not, there may be a large surplus distributable among the holders of the 2324 shares, which will come out of the pockets of the defendants, who, (though their manager has) have done nothing wrong, with no remedy for them except against Stafford, or the pauper allottees, or their manager, or perhaps directors.

We have been pressed with the case of *Gray* v. *Lewis* (2). Now, in the first place, that case was expressly decided on equitable considerations. We must decide this on legal principles. So that, even if the cases were undistinguishable in their facts, this is not necessarily governed by that. But, in truth, the cases are distinguishable.

The whole of the reasoning of that judgment (except that addressed to technical points relating to the form of the suit) goes to this—that the defendants are bound to "restore" the plaintiffs' money, thus assuming that the money in question had actually become the plaintiffs', which indeed in one passage the Vice-Chancellor expressly states that he did assume. He made this assumption upon facts very similar to those in the present case, though, as we shall shew, not identical. For in *Gray* v. *Lewis* (2) the advances by the National Bank to the International Contract Company (which stood in the same position as Stafford in the present case), were made by discounting their acceptances. Certain sums were placed to the credit of the contract company as the proceeds of the acceptances, and the sums so credited appear to have been drawn out from time to time by cheque; when the proceeds of the first lot of bills were exhausted the bills were discounted and another guarantee taken. The bills discounted may have been, and probably were, of little value; still, during the currency of the bills so held by the National Bank, it could scarcely be said that the sums of money dealt with in account and representing the proceeds of these bills, were wholly fictitious.

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(1) The numbers 11,506 and 2324 were the numbers of the pretended and real allotments respectively.

(2) Law Rep. 8 Eq. 526.

In the present case, however, there was not even so much appearance of reality in the matter as was there presented by the discount of the bills of exchange. On looking at Stafford's account, it will be seen that, even giving him credit for the supposed loans, it was almost always, if not always, overdrawn. In fact, the account was evidently balanced, or nearly so, from time to time, by entering on the credit side loans to about the amount of the sums already drawn out for payment to the plaintiffs' account. But further than this, there was more ground in that case than here for saying there was an estoppel. Here the committee of the Stock Exchange refused the settling day, and it is expressly found in the case, that the bonâ fide shareholders in the plaintiffs' company had all taken their shares before the commencement of these transactions. In *Gray* v. *Lewis* (1) the committee of the Stock Exchange had, upon the faith of the statement made to them as to Lafitte & Co.'s balance, granted the settling day. This fact is not distinctly stated in the report of *Gray* v. *Lewis* (1) in the Law Reports, though it might be inferred from that report that it was so. In the report in the Weekly Reporter (2) the fact is distinctly stated. There can be little doubt that the result of the settling day being granted was that many transfers of shares were carried out and new shareholders put on the register, so that in all probability the constitution of the company, as regards its individual members, was materially altered. It may well be that in that state of things—the statement of the National Bank (as to Lafitte & Co.'s balance) having been so acted on as to affect the constitution of the company, and to make persons liable as contributories who would not otherwise have been so liable—the statement became binding on the National Bank, so that they could not be allowed to set up the argument that they had not really received money for Lafitte & Co. for which they were accountable. As we said the Vice-Chancellor scarcely states his reasons for assuming that the money in question was actual money of Lafitte & Co.'s. This may have been because he thought it unnecessary to allude to a doctrine so familiar to the Court of Chancery as that according to which statements not binding in the first instance become so by

(1) Law Rep. 8 Eq. 526.

(2) 17 W. R. at p. 433.

being acted on. Whatever his reasons may have been, we think there is a sufficient difference between the facts of the two cases to prevent our being bound to follow the Vice-Chancellor to the full extent of directing payment of the whole nominal balance at one time shewn upon the account between the plaintiffs and the defendants.

We agree with him upon the question with which he mainly dealt, viz., that the money appropriated to the satisfaction of the guarantee must be restored, that is to say, applying the decision to the facts and pleadings in the present case, that the defendants' set-off cannot be maintained. But we think that the plaintiffs fail to shew a greater amount of money payable to them than 1500*l.*; of this 600*l.* has been paid into court, and there should therefore, in our opinion, be judgment for the plaintiffs for 900*l.* No question will probably be raised as to the few shillings charged for stamps, which are the only items appearing in the account besides those with which we have dealt.

Judgment for the plaintiffs for 1500*l.*

Attorney for plaintiffs: *Clements.*
Attorneys for defendants: *W. & H. P. Sharp.*

JOSSELYN v. PARSON AND OTHERS.

Jan. 22.

Covenant not to carry on a Trade—Construction—"Merchant."

3 Ch. D. 231.

In an action on a bond, conditioned that the defendant should not "travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise":—

Held (by Bramwell and Pigott, BB.; Martin, B., doubting), that the condition of the bond was not broken by the defendant's entering into the service, as traveller, of a brewer.

ACTION on a bond for 100*l.*, dated the 22nd of December, 1866, given by Henry Parson, as principal debtor, and the other defendants as his sureties, upon his entering into the employment, as traveller, of the plaintiff, a porter, ale, and spirit merchant, at Colchester; one of the conditions of the bond being, that the said Henry Parson "do not at any time or times within twelve calendar months after the termination of his service with the said Charles

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Josselyn, travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise, in Colchester aforesaid, or within twenty-five miles thereof."

At the trial before Byles, J., at the Suffolk Summer Assizes, 1871, it appeared that the defendant quitted the plaintiff's service in April, 1871, and on the 12th of June following, entered the service, as traveller and collector, of Messrs. Daniels, who were brewers at Colchester, and solicited the plaintiff's customers within twenty-five miles of Colchester, for orders for ale and porter brewed by the Messrs. Daniels. At Colchester Messrs. Daniels had a brewer's (1) but not a dealer's licence (2); in London they had a store, and took out a dealer's licence, but only sold ale brewed by themselves at Colchester. It was contended for the defendants, that no breach of the condition was shewn, a brewer selling his own beer not being a "porter, ale, or spirit merchant;" and a verdict was entered for the plaintiff for nominal damages, with leave to the defendants to move to enter it for them, the Court to be at liberty to draw inferences of fact, and their judgment to be final. A rule having been obtained accordingly.

No one appeared to shew cause.

Bulwer, Q.C., and *Graham*, in support of the rule, cited Com. Dig. Merchant (A): "Every one shall be a merchant who traffics by way of buying and selling, or bartering of goods or any merchandize, within the realm, or in foreign parts;" and contended that a man who merely sold what he manufactured could no more be called a merchant than a farmer could who sold the grain which he had raised, or the owner of a vineyard who sold the wine grown there. A merchant is one who both buys and sells; that is, buys the same thing that he sells, and makes his profit out of the difference in price; and that the distinction between the trade of a dealer as carried on by the plaintiff, and the trade of a brewer as carried on by the Messrs. Daniels, was recognized by the legislature in the various statutes, which regulated the different licences granted to each.

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(1) See 6 Geo. 4, c. 81, s. 2; 11 Geo. 4 & 1 Wm. 4, c. 51, s. 7; 13 & 14 Vict. c. 67, ss. 6, 7.

(2) 6 Geo. 4, c. 81, s. 2; 26 & 27 Vict. c. 33, s. 1.

BRAMWELL, B. I think this rule should be absolute. The question is, did the defendant by entering the service of a brewer, break his engagement not to enter the service of a "porter, ale, *or* spirit merchant," in the disjunctive; that is, is a brewer, as such, without more, a porter or ale merchant? Now one understands a merchant of or in any merchandize, to be a merchant of that merchandize generally. A wine merchant deals in wine generally, port, sherry, claret, champagne, &c. He need not deal in every wine, for though he sold no Hungarian, he could well call himself a wine merchant. But if he sold port only, he should properly call himself a port wine merchant. So of a spirit merchant, he sells gin, brandy, rum, whisky, &c., and if he sold brandy only, should call himself a brandy merchant. A porter merchant, in the same way, sells porter generally, London porter, Dublin porter, Cork porter; but if he sold one sort only, he should describe himself accordingly as a Dublin porter merchant, or, as they commonly say, agent for the sale of Dublin porter. Treating the defendant, therefore, as being in the service of a seller of one sort of beer and ale only, viz., his present master's brewing, I think his master ought to be called a Colchester beer merchant, or some other limited name. I think a porter merchant is a man who deals in all or many sorts of porter, not one only. On this ground alone I should think the defendant right.

But in addition to this, I agree with Mr. Bulwer that a merchant of or in an article is one who *buys and sells* it, and not the manufacturer selling. A wine grower is not a wine merchant; even a wine importer is not called a wine merchant, but a wine importer. So of distillers, and so of a brewer, as here. The reason of the thing is the same way. The brewer is a man who deals with the ale and porter merchant, not one who competes with him, at least in all cases.

PIGOTT, B. I quite agree. There is all the difference between those who manufacture, and those who buy to sell again. The distinction is well defined, and generally understood; it prevails in many trades, and in none more than in this. It is the same that exists between a horse breeder and a dealer, or between a farmer and a meat salesman. The defendant's present employers are the very persons of whom the plaintiff would buy.

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MARTIN, B. I do not dissent; but I must say that the matter does not present itself so to my mind. It appears to me that what the defendant has done is within the spirit and meaning of the bond. But my learned Brothers are of a contrary opinion, and it appears that the learned judge who tried the cause agrees with them; the rule must therefore be made absolute.

Rule absolute.

Attorneys for plaintiff; *Doyle & Edwards.*

Attorneys for defendant: *Kingsford & Dorman.*

Jan. 29.

BRITTON *v.* GREAT WESTERN COTTON COMPANY.

Master and Servant—Dangerous Machinery—Duty to Fence—Contributory Negligence—Knowledge of Danger—7 *Vict. c.* 15, *s.* 21.

B., aged twenty-two, was employed by the defendants, the owners of a "factory" within the meaning of 7 Vict. c. 15, to grease the bearings between the fly and spur-wheel of a steam-engine in their engine-house. In order to do the work he had to stand on a wall 2 ft. 3 in. thick, in a cavity made for the purpose, into which he crawled through the spokes of the fly-wheel: the fly-wheel being on his left hand revolving in a "wheel-race" in the engine-house, and the spur-wheel on his right hand, revolving in another room in the factory. The distance between the spokes of the two wheels was 2 ft. 10 in. There was no fence along the wall edge of the wheel-race, on which B. was placed to do his work, and the fly-wheel, near to which, however, children or young persons were not liable to pass or be employed, was unfenced. At the time of the accident B. had been at the work for five days. On the sixth morning, he was caught by the fly-wheel, whirled into the air and killed. At the trial of an action by his widow and administratrix for pecuniary loss sustained by his death, the jury found that he had not been guilty of contributory negligence, either in undertaking the employment, or whilst engaged upon it, and returned a verdict for the plaintiff. On a rule to set it aside, pursuant to leave, on the ground that there was no statutory duty to fence the place in question, and that the deceased had voluntarily encountered the risk incidental to his employment:—

Held, 1st, that the defendants were bound under 7 Vict. c. 15, s. 21, to fence the place where B. had to stand, it being the edge of a wheel-race not otherwise secured; and, secondly, that the dangerous character of the employment was not so obvious as that he must necessarily be taken to have known it; or that, even assuming he did know it, that circumstance alone was not enough to constitute him a "volunteer" in such a sense as to exonerate the defendants from liability for the consequences of their breach of their statutory duty.

Semble, that the 7 Vict. c. 15, s. 21, imposed on the defendants an unqualified duty to fence the fly-wheel, whether children were liable to pass or be employed near it or not.

DECLARATION by the plaintiff, as administratrix of Samuel Britton, deceased. 1st count, that at the time, &c., the defendants carried on their business in a factory at Bristol, and were the owners of machinery therein, and that Samuel Britton in his lifetime, was employed by the defendants as an engine-driver and an engineer to work for them in the factory, and in and about the machinery; and in the course of his employment it was necessary for him to place himself close to the fly-wheel and spur-wheel of a certain steam-engine, in order, at the defendants' request, to lubricate and keep lubricated the bearings connected with the fly-wheel and spur-wheel of the steam-engine; that through the negligence and default of the defendants, the fly-wheel and spur-wheel of the steam-engine were unsafely and defectively constructed, and were insufficiently guarded, fenced, and protected, and were in an unsafe and unfit condition for being used and lubricated, which the defendants well knew, and whereof Samuel Britton was ignorant; and by reason of the premises, and also by reason, as the defendants well knew, of no sufficient and proper apparatus having been provided by the defendants, to protect Samuel Britton while so employed by them in and about the lubricating the bearings connected with the fly-wheel and spur-wheel, from injuries arising from the unsafe and unguarded state of the fly-wheel and spur-wheel, Samuel Britton, whilst he was lubricating the bearings, was caught by and became entangled with the fly-wheel which was then in motion, under the order and by the direction of the defendants; and was whirled, and dragged about, and injured, and afterwards and within twelve months before suit, died of his injuries.

2nd count. That the defendants at the time, &c., and after the passing of the 7 Vict. c. 15 and 19 & 20 Vict. c. 38, carried on the business of cotton-spinners in a building at Bristol, and therein, for the purposes of the business, a steam-engine, producing steam power, was used to work machinery employed in preparing and manufacturing cotton and in the process incidental to the manufacture of cotton, the building being a "factory," within the meaning of the statutes; and there was in part of the building a wheel-race, not in any way secured, and not fenced close to its edge, being a wheel-race within the meaning of the statutes; and in part of the building mill-gearing, being mill-gearing within the meaning of the statutes; and the machinery in the factory was, at the time, &c., put in motion, and was in motion by the steam-

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engine and power thereof for the purpose of the manufacture and process; the part of the building where it was in motion, not being a part which by the 73rd section of the first-mentioned Act of Parliament or otherwise, was declared to be a part of the factory or place to which the enactments of the Act, or the definition of the word "factory," were not to extend. That the building with mill-gearing, steam-engine, and power, were, at the time, &c., under the care and management of the defendants, and were such as ought according to the statutes to have been securely fenced, and the wheel-race was a wheel-race not otherwise secured, which ought to have been fenced close to its edge; and the steam-engine was a steam-engine, near to which children or young persons were liable to pass, or be employed; and the mill-gearing was mill-gearing with which children, and young persons, and women, were liable to come in contact, either in passing, or in their ordinary occupation in the factory. That Samuel Britton was lawfully, and at the request of the defendants, in that part of the factory. Yet the defendants disregarded their statutory duty, and did not securely fence the steam-engine and mill-gearing, nor were the same or either of them securely fenced, and did not fence the wheel-race, not being otherwise secured, close to its edge, or otherwise secure the same; whereby Samuel Britton, deceased, was caught up, and whirled about by certain parts of the steam-engine and mill-gearing, and injured, and afterwards, and within twelve months before suit, died of his injuries; and that the plaintiff sued as administratrix to recover the pecuniary loss caused to herself, as the wife of the deceased, and to his child, by his death.

Pleas (inter alia): 1. Not guilty; 5, to 2nd count, traverse that the machinery required fencing; 7, to same, that the deceased's death was caused by his own negligence. Issue. (1)

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(1) 7 Vict. c. 15, s. 21 enacts, with regard to cotton among other factories, that "every fly-wheel directly connected with the steam-engine or water-wheel, or other mechanical power, whether in the engine-house or not, and every part of a steam-engine and water-wheel, and every hoist or teagle near to which children or young persons are liable to pass or be employed, and all parts of the mill-gearing in a factory shall be securely fenced; and every wheel-race not otherwise secured shall be fenced close to the edge of the wheel-race; and the said protection to each part shall not be removed while the parts required to be fenced are in motion by the action of the steam-engine,

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At the trial, before Brett, J., at the Bristol Summer Assizes, 1871, it was proved that Samuel Britton, who was twenty-two years old, entered the defendants' service as a coal trimmer on the 27th of September, 1870. He was promoted to be engine-driver on the 11th of October, and on the 14th of October was requested to grease the bearings between the fly and spur-wheel of a steam-engine. The fly-wheel was 15 feet and the spur-wheel 16 feet in diameter. At the time of the accident which caused his death, he had been five days at this work. In order to do it, he had to stand on a wall, in a cavity made for the purpose, into which he crawled through the spokes of the fly-wheel, which was on his left hand, revolving in a wheel-race in the engine-house, at the rate of fifty-six revolutions a minute; the spur-wheel being on his right hand, revolving at the same rate in a room in the factory. The wall was 2 ft. 3 in. thick and the utmost distance between the spokes of the two wheels was 2 ft. 10 in. The wheel-race in which the fly-wheel revolved was fenced in the engine-house along its outer edges, but was unprotected on the wall side at the place where Britton was placed to do his work. On the sixth morning of his employment, he was caught up by the fly-wheel, whirled into the air, and killed. This action was then brought under Lord Campbell's Act, to recover the pecuniary loss caused to his widow and child by his death.

The learned judge was of opinion that there was no evidence for the jury on the first count of the declaration, and as to the second, that there was no duty under 7 Vict. c. 15, s. 21 to fence the fly-wheel unless children were liable to pass or be employed near it, but that there was an unqualified duty to fence the wheel-race not being otherwise secured, close to its edge; and asked the jury, first, whether the place in question was the edge of a "wheel-race" (as to which there was some conflict of evidence); and, secondly, whether the deceased had been guilty of contributory negligence either in undertaking the employment or whilst engaged upon it.

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water-wheel, or other mechanical power for any manufacturing process.

19 & 20 Vict. c. 38, s. 4 enacts that the above section, "so far as the same refers to the mill-gearing, shall apply only to those parts thereof with which children and young persons and women are liable to come in contact either in passing or in their ordinary occupation in the factory.

The jury answered these questions in the plaintiff's favour, and a verdict was accordingly entered for her for £200, leave being reserved to the defendants to move to enter a nonsuit or verdict for them, if upon all facts the judge ought to have ruled that there was no evidence for the jury of their liability.

A rule was afterwards obtained accordingly, on the grounds, among others, that there was no statutory duty to fence the place in question, and that the deceased had voluntarily incurred the risks incidental to his employment.

H. T. Cole, Q.C. (*A. Charles* with him), shewed cause. The defendants were guilty of a breach of their statutory duty. Sect. 21 of 7 Vict. c. 15 imposes on them an unqualified duty to fence the fly-wheel of a steam-engine, whether children are or are not liable to pass near it. The exemption from the duty to fence, except where there is a liability of children passing, is confined to the immediately preceding words "every hoist or teagle." As to the other parts of the machinery mentioned, the defendants must fence them in any event. Mill-gearing, it is true, by the subsequent Act (19 & 20 Vict. c. 38, s. 4) need not be fenced unless children are likely to pass or come into contact with it, but nothing in either of the Acts restricts the owner's duty in respect either of a fly-wheel or a wheel-race; and for a failure to perform that duty they are responsible to adults and children alike. No doubt the primary object of the Factory Acts was to protect young people, but, secondarily to protect all persons, old or young, employed in the factory: *Coe* v. *Platt* (1); *Doel* v. *Sheppard.* (2) Now, in the present case the jury have found that the deceased was at the time of the accident on the edge of a wheel-race; that being so, there should have been a fence to protect him, for the wheel-race was not "otherwise secured" within the meaning of the statute. Even assuming, therefore, that the earlier part of the section is ambiguous, and that the fly-wheel, not being easily accessible to children, did not require fencing; still the wheel-race ought to have been fenced. The defendants will contend that the outside edge of the wheel-race alone requires protection. But there is a fallacy in the term. Every edge on which a person in the course

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(1) 6 Ex. 752; per Parke, B., at p. 757. (2) 5 E. & B. 856; 25 L. J. (Q.B.) 124.

2 Jur N.S. 118.

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of his employment is required to stand needs a fence, and the place where the deceased was standing was, quoad him, an outside edge. If the Acts had been passed for the protection of the public there would have been some colour for the defendants' contention. But they were passed not for the benefit of casual visitors to a factory, but for that of those whose daily work obliged them to be in positions of danger. Next it will be said that the deceased voluntarily undertook this employment, and was therefore disentitled to recover. But, there is no pretence that whilst at his work he was guilty of carelessness or misconduct, as was the case in *Caswell* v. *Worth.* (1) The only contributory negligence he can be charged with was in going to the work at all; and as to this the jury have exonerated him. In fact, the place where he stood was not *necessarily* dangerous; and he might reasonably suppose it was a place to which he might go without imprudence. The work was to a certain extent hazardous, but still a knowledge of the danger is only an element in the case, and was properly left in this case to the consideration of the jury. *Holmes* v. *Clarke* (2) is in point for the plaintiff. There the person injured unquestionably knew and complained of the danger, and yet was held entitled to recover. There being, therefore, a clear default on the defendants' part, and no contributory negligence in the deceased, either in undertaking or whilst doing the work, the verdict ought to stand. He may have known the employment was dangerous and yet not have appreciated the risk he was running, and unless he understood both the danger and the risk, the maxim, "Volenti non fit injuria," does not apply. He was not a "volunteer," and the defendants must bear the consequence of their breach of duty: *Paterson* v. *Wallace* (3); *Bartonshill Coal Co.* v. *Reid.* (4)

Kingdon, Q.C., and *Pinder,* in support of the rule. First, the fly-wheel did not require fencing, because there was no evidence that children were liable to pass near it. As to the wheel-race it was "otherwise secured." The evidence was that it was only by crossing the fence which was erected round the outer edge and climbing through the spokes of the fly-wheel itself that the

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(1) 5 E. & B. 849; 25 L. J. (Q. B.) 121. 2 Jur NS 116

(2) 6 H. & N. 349; 7 H. & N. 937; 30 L. J. (Ex.) 135; 31 L. J. (Ex.) 356.

(3) 1 Macq. 748.

(4) 3 Macq. 286.

(2) LC 7 Jur NS 398; 8 LT 992.

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deceased could reach the place where he had to stand. The defendants had done all the statute required in protecting this outer edge, and the cavity in the wall was not such a place as required fencing within the meaning of the statute. It was not a place where, in the ordinary course of business, any one would, or indeed could, go, and the deceased having consented to go there for a temporary purpose could not complain of the want of a fence. He was the author of his own misfortune, and in every sense of the word a "volunteer." It is true the jury exonerated him from contributory negligence, but the defendants have leave to enter the verdict if the Court should think that there was no evidence which ought to have been left to the jury; and here it was clear upon the whole facts that the deceased must have known, not only the dangerous character of his employment, but also the risk he was running. *Holmes* v. *Clarke* (1) is distinguishable. There the injured man was induced by the defendants' promise to fence to go on working, and met with his injuries while working upon the faith that his employers would protect him properly. Here the deceased of his own accord undertook the risks of the employment. He might have declined to do the work if he had chosen; but having undertaken it, with his eyes open, his representative cannot recover in this action: *Mellors* v. *Shaw.* (2)

BRAMWELL, B. I think this rule ought to be discharged, although during the argument I have had great doubt as to what our decision should be. We might, in my opinion, found our judgment on the case of *Holmes* v. *Clarke* (1), where indeed there was a weaker case for the plaintiff than there is here. But though I agree in the decision arrived at there, I cannot follow the reasoning of some of the Judges in the Exchequer Chamber. This being so, I desire to shew that independently of that authority I should have come to the conclusion in this case that the plaintiff is entitled to succeed.

Now I am clearly of opinion that the place where the deceased was standing ought to have been fenced. I think the true construction of the 7 Vict. c. 15, s. 21, is that there is an unqualified duty to fence "every fly-wheel directly connected with the steam-engine or water-wheel, or other mechanical power, whether in the engine-house or not," in all cases, whether children are liable to pass or not. That duty has since been limited as far as mill-gearing is concerned, by the 19 & 20 Vict. c. 38, s. 4, just as in the earlier Act the duty was limited as regards hoists or teagles. But I see no reason for construing the section otherwise than as imposing an obligation to fence the fly-wheel of a steam-engine and the engine, as absolute as exists in the case of a wheel-race. However, it is not necessary to decide this point, for the section proceeds to enact that "every wheel-race, not otherwise secured, shall be fenced close to the edge of the wheel-race;" and as to these words imposing a duty to fence in all events, there is no possibility of doubt. Then, in this case it is admitted that the wheel-race was not fenced, nor was it otherwise secured. But it is contended that no fence was wanted, because the edge where Britton was placed could only be reached in an exceptional manner, and was not a place where anybody would be except occasionally on some special duty. The evidence, however, does not support this contention. The deceased had himself been there for five days, and the place ought to have been fenced so as to prevent any one from falling against or becoming entangled with the wheel.

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(1) 6 H. & N. 349; 7 H. & N. 937; 30 L. J. (Ex.) 135; 31 L. J. (Ex.) 156. 7 Jur N.S. 397; 8 do 992

(2) 1 B. & S. 437; 30 L. J. (Q.B.) 333. 7 Jur N.S. 845

The defendants, therefore, were in default. But now we come to the great difficulty in the case. Does the maxim, "Volenti non fit injuria," apply? I think not. True, Britton was in one sense "volens." He need not have gone where he did. But he must not only be a volunteer in the sense that he went there when he might have stopped away, but it must clearly appear that he went voluntarily, with a full knowledge and understanding of the risk. It is suggested he must have known it. I doubt it. The jury have found him not guilty of contributory negligence either in going or being there, and I cannot say they were wrong. I do not myself see that the place was necessarily dangerous. At any rate the deceased may well have thought it was not. Indeed, the accident seems to have resulted not from the necessarily dangerous character of the place, but from some misfortune which might have happened anywhere. It is further contended that at any rate the deceased knew the danger as well as his employers. That may be

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doubtful in fact, for he seems not to have been a skilled workman, but a coal trimmer. Assuming, however, that he did share his employers' knowledge, it must be remembered that the liability of the defendants here is not at common law but by statute. They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was exposed. For these reasons, therefore, I think the verdict was right and ought to stand. The deceased is found by the jury not to have been guilty of any contributory negligence, and having regard to that finding and the mode in which the question was left to them, I cannot see that he was a "volunteer" in such a sense as to afford a defence to this action.

CHANNELL, B. I am of the same opinion. I agree with what has been said by my Brother Bramwell on the construction of the statute, and with the distinction between a statutory and common law liability, not by any means questioning the proposition, however, that in either case, contributory negligence on the part of the person injured would afford a defence. As to the second point, I do not think that the deceased was a volunteer in a sense which would have disentitled him to recover if he had lived. I think he might have maintained an action for the injuries he sustained. In *Mellors* v. *Shaw* (1) there is a marked distinction in the language used by Crompton, J. (2), in dealing with the case of one who undertakes dangerous work in the ordinary course of his employment, and one who undertakes extra risk for extra wages. In the latter case he would be properly considered a "volunteer," because for a higher rate of remuneration he undertakes the risk, knowing its nature.

I do not wish to add any observations on the particular facts of the present case. I think *Holmes* v. *Clarke* (3) is decisive in the plaintiff's favour. It was, indeed, a stronger case than this, because there the plaintiff chose to go on working, although he knew the defendant had not securely fenced the machine, and yet he was held entitled to recover.

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(1) 1 B. & S. 437; 30 L. J. (Q.B.) 333.

(2) 1 B. & S. at p. 446. 7 Jur NS 845

(3) 6 H. & N. 349; 7 H. & N. 937; 30 L. J. (Ex.) 135; 31 L. J. (Ex.) 356.

(1) SC 7 Jur NS 845 7 Jur NS. 397 & do 992

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PIGOTT, B. I agree in thinking that this rule should be discharged. The first question is whether the defendants are in default. That depends on the construction of 7 Vict. c. 15, s. 21; and I concur in the remarks of my Brother Bramwell on that section. The words as to the fencing of a wheel-race at least are clear. No doubt, if no one had ever had occasion to go to the place in question, it might be said that the wheel-race was "otherwise secured;" but here it was a workman's duty to go there continually, and there being no fence to protect him from falling into the race or against the fly-wheel, I think the defendants were guilty of a breach of their statutory duty. The place was neither fenced nor otherwise secured. Then, the next question is, whether deceased would have disentitled himself to recover by reason of contributory negligence. Upon the facts and findings of the jury I do not think he would. I do not think we can safely say that he must have known the risk he was running. The place was no doubt a dangerous place; but he may very well have been ignorant of the real nature of the risk.

I may add that I should have been better satisfied if *Caswell* v. *Worth* (1) had been otherwise decided; and that the master there should have been held liable, as he had been clearly guilty of a breach of his statutory duty. However, there is nothing in that case inconsistent with our decision here. It seems that even although there may be a statutory duty, imposed on the employer, the workman must still be careful of his own safety. In this case there is nothing to shew that the deceased knowingly incurred the danger, or was guilty of any want of care, and the defendants, therefore, ought to bear the consequences of their own clear neglect of duty.

Rule discharged.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Co., for Benson & Elletson, Bristol.*

Attorneys for defendants: *Meredith & Co.*

(1) 5 E. & B. 849; 25 L. J. (Q.B.) 121. 2 Jur NS 116

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Feb. 7.

[IN THE EXCHEQUER CHAMBER.]

DE LANCEY *v.* THE QUEEN.

Legacy Duty—36 *Geo.* 3, *c.* 52, *s.* 19—*Money to be laid out in Land—Unconverted Fund falling into Possession.*

A testator, who died in 1800, by his will bequeathed to trustees a fund to be laid out in land, which was to be conveyed to the use of C. (his eldest son) for life, remainder to C.'s first and other sons in tail male, remainder to J. (his second son) for life, remainder to J.'s first and other sons in tail male, remainder to his own right heirs.

C. and J. died without issue and intestate, and S., the testator's only daughter, became entitled to the fund, being heir-at-law to the testator, as well as to C. and J. She died intestate, and at her death, the fund, which had never been invested in land, passed to E., who was grandnephew of the testator and heir-at-law of the testator and of C. J. and S.:—

Held (affirming the judgment of the Court below), that under s. 19 of 36 Geo. 3, c. 52, duty was payable by E. at 5 per cent. as on a bequest from S.

Error from the decision of the Court of Exchequer in favour of the Crown on a demurrer to a plea to a petition of right. (1)

The petition set out the facts stated in the case of *In the Matter of De Lancey's Succession* (2), and the decision of the Court of Exchequer and of this Court on the question there raised; and stated that the petitioner, Edward Floyd de Lancey, a grandnephew of the testator, was heir-at-law of Charles Stephen, James, and Susan de Lancey, and entitled to the fund bequeathed by the testator to be laid out in land; that the Commissioners of Inland Revenue refused to return to the petitioner the sum paid to them upon their erroneous assessment of succession duty at 5 per cent., and claimed to retain it, although they had made no assessment of legacy duty in respect of the fund, and although the legacy duty payable was only at the rate of 2½ per cent.; and claimed a return of the whole sum so paid, or the balance, after deducting legacy duty at 2½ per cent., with interest.

Plea: That the legacy duty payable on the fund was at the rate of 5 per cent., being duty payable as on a legacy or residue of personal estate coming to the petitioner from Susan de Lancey.

Demurrer and joinder.

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(1) Law Rep. 6 Ex. 286.

(2) Law Rep. 4 Ex. 345; Law Rep. 5 Ex. 102.

Sir J. B. Karslake, Q.C. (*Townsend* with him), for the petitioner. The duty payable, according to the decision of this Court, is legacy and not succession duty, and the question of the rate depends on the construction which ought to be placed on 36 Geo. 3, c. 52, s. 19. (1) The proviso applies, the fund never having been converted, and the petitioner is to pay the same duty as if he were absolutely entitled to the money as personal estate, "by virtue of any bequest." These words must refer to a bequest by the original testator, not by Susan de Lancey, who did nothing to constitute herself a new root. The section contemplates no other person than the original testator, under whose will the petitioner may be said to claim. For it was by that will that the money was impressed with the character of realty, and as such came to him as heir-at-law alike of Susan and the testator. If this contention is right, only 2½ per cent.

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(1) By 36 Geo. 3, c. 52, s. 19: "Any sum of money or personal estate directed to be applied in the purchase of real estate shall be charged with, and pay duty, as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession; and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: provided, nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate, by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase."

By 55 Geo. 3, c. 184, sch. pt. iii., tit. "Legacies and Successions to Personal or Moveable Estate upon Intestacy," where the testator or intestate died before the 5th of April, 1805, duty was made payable at 2½ per cent. upon a devolution to or for the benefit of a brother or sister of the deceased, or any descendant of such brother or sister, and at 4 per cent. on a devolution to or for the benefit of a brother or sister of the father or mother of the deceased, or any descendant of such brother or sister; but where the testator died after the 5th of April, 1805, duty was payable at 3 per cent. and 5 per cent. in the respective cases. The testator, James de Lancey, died before the 5th of April, 1805, and therefore if the petitioner took from him, duty was payable at 2½ per cent.; Charles, James, and Susan all died after that date, and therefore if the petitioner took from them, or either of them, duty was payable at 5 per cent.

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is payable, for the testator died before the passing of 55 Geo. 3, c. 184, sch. pt. iii. tit. "Legacies and Successions to Personal or Moveable Estate on Intestacy," which first raised the duty from 2½ to 5 per cent.

Jessel, Q.C., S.G. (*C. Hutton* with him), was not called upon.

COCKBURN, C.J. We are all of opinion that the Court of Exchequer have put the right construction on the 19th section of 36 Geo. 2, c. 52, under which, Susan de Lancey having died since the 5th of April, 1805, the Crown claims duty at the rate of 5 per cent. The proviso in that section appears almost to contemplate this very case. The testator here leaves a fund to be laid out in land to his first and second sons successively for life, with remainder to their respective issue, and an ultimate remainder to his own right heirs. The two sons both die childless, and then the fund, which had never been converted, comes into the hands of Susan, as right heir of the testator. The present suppliant is now entitled as her heir-at-law. The original will was exhausted when the fund reached Susan, who was entitled to it under the ultimate limitation, and the petitioner does not take under the will at all. True, he takes as heir-at-law of Susan, and not as her next of kin, but this is because the original will impressed the character of land absolutely on the fund in question, and does not prevent him from being considered to take immediately from her whose immediate heir he is. Then the section provides that the same duty is under these circumstances to be paid, as ought to be paid by a person absolutely entitled to the fund "by virtue of any bequest" thereof. That is, the heir is to pay duty on the fund, just as if he had received it by bequest from the person whom he succeeds, and who might have bequeathed it to him as pure personalty. That person is Susan de Lancey in this case, and the suppliant must accordingly pay duty as upon a supposed bequest from her. The true construction of the section cannot be given more clearly than in a paraphrase of it which has been handed to me by my Brother Grove, and which is as follows:—"Any person who shall become entitled to an estate of inheritance in possession in real estate, to be purchased with money directed to be so applied, shall pay the same duty which ought to be paid by him if entitled thereto

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as personal estate by bequest." The judgment of the Court below must therefore be affirmed.

Willes, Blackburn, Mellor, Brett, and Grove, JJ., concurred.

Attorneys for petitioner: *Townsend, Lee, & Houseman.*
Attorney for Crown: *Solicitor of Inland Revenue.*

RENNISON *v.* WALKER and Another.

Jan. 25.

Practice—Amendment—Misjoinder of Defendants—15 & 16 *Vict. c.* 76, *s.* 37—*Cause tried in County Court under* 19 & 20 *Vict. c.* 108, *s.* 26.

Where a cause is sent down for trial to a county court under 19 & 20 Vict. c. 108, s. 26, the county court judge has power at the trial to amend a misjoinder of defendants under 15 & 16 Vict. c. 76, s. 37.

This was an action, commenced in this court and sent down for trial to the Marylebone County Court, under 19 & 20 Vict. c. 108, s. 26. The action was brought, by writ specially indorsed, against Thomas Walker, the father, and William Walker, the son, to recover a sum of money alleged to have been lent to them jointly. Judgment had been signed against William Walker for default of appearance, and the plaintiff had declared, under s. 33 of 15 & 16 Vict. c. 76, against Thomas Walker, suggesting the judgment.

At the trial before the learned deputy judge of the county court and a jury, it was conceded that there was no evidence of a joint liability, and the plaintiff applied for an amendment by striking out the defendant William Walker. The deputy judge, however, was of opinion that he had no power to make the amendment asked for, and he therefore directed a verdict for the defendants.

McCall, having obtained a rule for a new trial, on the ground that the learned deputy judge ought to have made the proposed amendment, citing *Greaves* v. *Humfries,* (1)

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(1) 4 E. & B. 851; 24 L. J. (Q.B.) 190. 1 Jur. N.S. 473.

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Willis shewed cause, and cited *Wickes* v. *Grove* (1), *Holden* v. *Ballantyne* (2), and *Wilkins* v. *Steele.* (3)

BRAMWELL, B. The 37th section of 15 & 16 Vict. c. 76, which is the section applying to a misjoinder of defendants, speaks expressly of the judge "or other presiding officer." It is clear, therefore, that the county court judge had power to amend. But the matter must be referred to a judge at chambers, who will consider whether the amendment ought to have been made, and will settle as to costs in the event of the case going down again for trial.

CHANNELL and PIGOTT, BB., concurred.

Rule absolute for a new trial, conditional on a summons being taken out at chambers within a fortnight to amend the record by striking out the name of the defendant William Walker; if no order, rule discharged; costs of the trial and other proceedings to be in the discretion of the judge at chambers.

Attorney for plaintiff: *Apps.*
Attorney for defendant: *E. Hare.*

(1) 2 Jur. (N.S.) 212.
(2) 29 L. J. (Q.B.) 148.
(3) 2 C. B. (N.S.) 488; 26 L. J. (C.P.) 241.

EARL OF ABERGAVENNY *v.* BRACE.

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Jan. 23.

Inalienable Estate Tail—Statute of Limitations (3 & 4 *Wm.* 4, *c.* 27), *ss.* 2, 21.

5 LRD 373
[illegible]
9 QBD 429

By a private Act of 2 & 3 Ph. & M. certain lands were limited to E. N. and others successively in tail male, with limitations over, and an ultimate limitation to the Crown; and it was provided that "no feoffment, discontinuance, fine, or recovery, with voucher or otherwise, or any other act or acts thereafter to be made, done, suffered, or acknowledged of the premises, or any part or parcel thereof," by E. N., or the other persons named, "or by any of them, or by any of their heirs male of their several bodies, ... should bind or conclude, or put from entry," the Crown, "or any of the heirs in tail."

A lease for three lives was made in 1781, by the heir in tail male of E. N., then in possession, of part of the lands so settled; the lease expired in 1832, and since that time the land had been held by the defendant, and those through whom he claimed, without payment of rent or acknowledgment of the title of the tenants in tail for the time being. In an action brought by the present heir in tail male of E. N. to recover the land:—

Held (by Channell and Cleasby, BB.; Bramwell, B., dissenting), that the plaintiff was not barred by 3 & 4 Wm. 4, c. 27.

Semble, the section of 3 & 4 Wm. 4, c. 27, which bars issue in tail is s. 2, and not s. 21.

SPECIAL case stated in an action of ejectment.

By an Act of Attainder of 31 Hen. 8, c. 15 (1), Sir Edward Neville was attainted, and his lands forfeited to the Crown.

By an Act of Restitution of 34 & 35 Hen. 8, c. 29 (1), Edward Neville was restored and enabled, in name and blood, as son and heir to Sir Edward Neville, and made capable to inherit all lands, &c., which should descend to him as son and heir, or heir of the body of Sir Edward Neville, or heir, or heir male, of any ancestor of Sir Edward Neville, as he might have done if the attainder of Sir Edward Neville had never been had, saving such rights, titles, claims, and demands as are therein expressed.

By a private Act of 2 & 3 Ph. & M. c. 23 (1), entitled, "An Act concerning the restitution of the heirs male of Sir Edward Neville, Knt.," the Act of Attainder and the Act of Restitution are recited, and it is enacted, that for lack of heirs male of the body of Henry Neville, Knt. (then Lord Abergavenny), the said Edward Neville might have, hold, and enjoy to him, and the heirs male of his body, all such lands, &c., and the reversion and remainder of the same, as by the will of the Right Hon. George Neville, Knt., then late Lord Abergavenny, deceased, were given, in use or possession, for default of heirs male of the bodies of George Lord Abergavenny (deceased), and Lady Mary his wife, and for lack of heirs male of the body of Sir Thomas Neville, then deceased, to Sir Edward Neville, and to the heirs male of his body, anything contained or specified in the Act of Restitution, or any saving proviso or other article in that Act contained, or in any other Act of Parliament, or any other matter or cause to the contrary notwithstanding; with limitations over, in default of heirs male of the bodies respectively of Henry Lord Abergavenny, and of Edward Neville, to Henry Neville and George Neville (brothers of Edward Neville) successively in tail male, and to the heirs of the bodies of George Lord Abergavenny (deceased), and his brother Sir Thomas Neville (deceased), successively in tail general, according to the will of George Lord Abergavenny. And that on the failure of those limitations, any heirs or issue of the body of Sir Edward Neville then living, the said Queen Mary, her heirs and successors should have, hold, and enjoy all the said lands, &c., and the reversions and remainders, for and during all such and so long time as any of the said heirs or issue of the body of Sir Edward Neville, lawfully begotten, should or ought to have had and enjoyed the same if the said Sir Edward Neville had not been attainted; and that no feoffment, discontinuance, fine, or recovery with voucher or otherwise, or any other act or acts thereafter to be made, done, suffered, or acknowledged of the premises, or any part or parcel thereof, by the said Henry Neville, then Lord Abergavenny, Edward Neville, Henry Neville, and George Neville, or by any of them, or by any of the heirs male of their several bodies, or by any of the heirs of the body of the said George, late Lord Abergavenny, or by any of the heirs of the body of the said Sir Thomas Neville, or any of them, should bind, or conclude in right, or put from entry the said Queen Mary, her heirs and successors, or any of the heirs in tail or any to whom the premises, or any parcel thereof, should descend, revert, remain, or come by virtue of the last will of the said George, late Lord Abergavenny. (1)

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(1) None of these Acts are printed in any collection of statutes.

Henry Neville Lord Abergavenny died without issue male of his body.

On the 8th of February, 1781, George Neville, Baron of Abergavenny, who was then tenant in tail in possession of the entailed lands as heir male of the body of Edward Neville under the will of George Neville Lord Abergavenny, and the entailing Act of 2 & 3 Ph. & M., duly granted by copy of Court Roll to John Sherbourne, to be held by him, his heirs, and assigns for the respective lives of himself, his wife, and his son, at the annual rent of 9*d.*, and subject to a heriot, certain pieces of land forming part of the entailed lands, and which are the lands sought to be recovered in this action.

The last survivor of the three cestui que vies under this grant died in 1832.

In August, 1868, the plaintiff became, on the death of his father, tenant in tail in possession of the entailed lands under the will and the Entailing Act, as heir male of the body of Edward Neville.

Since the death of the last cestui que vie in 1832, no rent had been paid in respect of the land to the persons who were for the time being tenants in tail in possession of the entailed lands, nor had either the defendant, or the persons through whom he claims, in any way recognized or admitted the right to the possession of the land of the persons who for the time being were tenants in tail in possession of the entailed lands.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in this action.

1871. June 21. *Waley* (*T. P. Price* with him), for the plaintiff. The Act of 2 & 3 Ph. & M. preserves the plaintiff's right notwithstanding the undisturbed possession of the defendant. The general

(1) By a proviso, certain lands granted by Edward VI. to Henry Lord Abergavenny, and which therefore would not be included in the will of George Lord Abergavenny, were expressly exempted from this restraint on alienation; and by further provisions power was given to Henry Lord Abergavenny to raise money on lands to be appointed by letters-patent, for portions for his daughters, payment of his debts to the king, and his own ransom.

intention of the Act to make this particular estate inalienable is clear, and the words chosen give full effect to that intention. In taking away the effect of what would be otherwise a discontinuance, the statute prevents any act of the tenant in possession from having the effect of depriving the tenant in tail of his right of entry and putting him to his action: Co. Litt. 325 a; and the word "suffered" (which is not to be restricted to the technical meaning of suffering a recovery) includes acts performed against the tenant, such as adverse possession. The general character of the Act, which makes the successive tenants of the land not so much tenants in tail as tenants for life, must be borne in mind in considering the operation of the Statute of Limitations; and it must be further remembered that the Act secures the reversion to the Crown, which clearly could not be barred of its rights by adverse possession: *In re Cuckfield Burial Board; Ex parte Earl of Abergavenny.* (1)

[*Joshua Williams, Q.C.*, for the defendant, admitted that neither the Crown nor the remainders in tail would be barred.]

The right of the defendant depends entirely upon ss. 1, 2, 21, 22 of the Statute of Limitations (3 & 4 Wm. 4, c. 27). And first, having regard to the nature of the title to this estate as established by the Act of 2 & 3 Ph. & M., the interpretation clause (s. 1) of the Statute of Limitations excludes it from the operation of that Act. It defines the "person through whom another person is said to claim," as meaning, "any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed as heir, issue in tail, &c.;" but the whole clause is controlled by the exception in the introductory words, that "the words and expressions hereinafter mentioned, . . . shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows, &c." Applying this exception to ss. 21 and 22, which enact in substance that where the bar of time would operate against the tenant in tail if living, or would have operated against him if he had continued in being, it shall operate against any person whom he could have barred, it is clear that those sections can have no relation to an indestructible entail. These sections make the bar of time dependent on the power of the tenant in tail to dispose of the estate; the context, therefore, excludes indestructible entails from their operation; otherwise a mere permissive occupation would effect more than the most solemn assurance. This view agrees with that taken by Lord St. Leonards in his work on Real Property, (1st ed.), p. 89; and it is also supported by *Cannon* v. *Rimington* (1), where it was held that, if the tenant in tail alienates by an assurance not barring the issue, time does not begin to run against them until his death, because he had no right of entry against his own grant.

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(1) 19 Beav. 153; 24 L. J. (Ch.) 585.

[BRAMWELL, B. It would appear that ss. 21 and 22 refer only to estates in remainder, the estate of the tenant in tail which descends to his issue being provided for already by s. 2.]

That does not seem to have been so considered in *Cannon* v. *Rimington.* (1)

Secondly, if there had been no such express limitation in s. 1, the general principle that special laws and rights are not derogated from by general ones, would have prevented the operation of the Statute of Limitations: Broom Max. (5th ed.) p. 36.

[BRAMWELL, B. Previous to 3 & 4 Wm. 4, c. 27, was there any Act which would have barred the plaintiff?]

None; nothing barred a tenant in tail that did not deprive him of his right of entry, and put him to his real action. An illustration of the principle that a privilege is not taken away by general words occurs in the 2nd Inst. 395; see also Dwarris on Stat., p. 621. Thirdly, the argument is supported by analogous cases as to the operation of the statute of 4 Hen. 7, c. 24, upon inalienable estates. Under that Act, fines and non-claims were held to bar issue in tail: Co. Litt. 372 a, Preston's Shep. Touch., p. 22; but not estates governed by 34 & 35 Hen. 8, c. 20, or by 13 Eliz., c. 10, s. 3. As to grants for public services governed by 34 & 35 Hen. 8, c. 20, this is shewn by the case of *Stratfield* v. *Dover* (2); that case is incorrectly stated in Co. Litt. 373 a; but the correction is furnished by Lord Nottingham's note, contained in n. 325 to that passage, which shews that judgment was ultimately given for the defendant: see Bayley on Fines, p. 74. The same is established as to ecclesiastical estates governed by 13 Eliz. c. 10, s. 3, by the *Magdalen College Case.* (1)

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(1) 12 C. B. 1; 21 L. J. (C.P.) 137; S. C. in Ex. Ch. 12 C. B. 18; 22 L. J. (C.P.) 153.

(2) Moore, 467; Cro. Eliz. 595; see post, p. 167, n.

He also referred to the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74), s. 18; the Blenheim and Strathfieldsaye Acts (5 Anne, c. 3; 54 Geo. 3, c. 161).

Joshua Williams, Q.C. (*Huddleston, Q.C.*, and *Day* with him), for the defendant. The case is independent of ss. 21 & 22 of 3 & 4 Wm. 4, c. 27; those sections relate only to remainders and reversions, and to such remainders and reversions only as could be barred by the tenant in tail. In the present case the remainders and reversion could not have been so barred, and the sections could not, therefore, in any case apply to this property. Prior to that statute the issue in tail would have been barred by lapse of time and adverse possession: *Doe* v. *Pike* (2); but not the remainderman; and it was to meet this difficulty that those sections were inserted: First Report of the Real Property Commission, p. 45; *Goodall* v. *Skerratt.* (3) But the plaintiff claims through his ancestor, and holds the same estate which his ancestor had; the case, therefore, turns upon s. 2 of 3 & 4 Wm. 4, c. 27, which is in no way limited by the subsequent sections. It may be that this section would not apply to such cases as those of Blenheim and Strathfieldsaye, because those were estates given for public services, and settled by public Acts of Parliament; but the estate in question was not given on any such consideration, and the Act which settles it is a private Act. (4) The case, however, of *Davis* v. *Duke of Marlborough* (5) shews that, even as to estates limited by a public

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(1) 11 Co. Rep. 66 b; 1 Roll. Rep. 151.

(2) 3 B. & Ad. 738.

(3) 3 Drew. 216; 24 L. J. (Ch.) 323.

(4) In support of the view that the Act was in the nature of a private Act, the following passages were referred to; the commencement of the Act, "In most humble wise beseecheth your Majesties, your true and faithful servant and loyal subject, Edward Neville, Esq.;" following the recital of the Acts of Attainder and Restitution, the words, "it may now please your Majesties of your most princely benignity and abundant grace at the most humble suit and petition of your said faithful subject and servant, Edward Neville, Esq., that it may be ordained, &c.;" and a clause following the provisions mentioned ante p. 147, n. 1, "saving unto the said Lady Frances, now wife of the said Lord of Abergavenny, and to all and every person or persons, &c., all such provision, estate, right, title, claim, interest, jointure, &c., as though this Act had never been had or made."

(5) 1 Swanst. 74, 83; 2 Swanst. 108, 135.

(3) S C 1 Jur N.S. 57

Act, the estate of the heirs in tail has the usual incidents of estates tail, except in so far as they are expressly curtailed by the terms of the Act. Therefore, even as to such estates, it might be contended that the Statute of Limitations applies, and this argument is strengthened by the express saving which it was thought necessary to insert in s. 18 of the Fines and Recoveries Act (3 & 4 Wm. 4, c. 74). But, at any rate, private Acts stand on a different footing, and are looked upon rather in the light of conveyances: 2 Bl. Com., pp. 344-346; *Hesse* v. *Stevenson.* (1) This Act, therefore, although it would take effect against any person deriving title from a fine or recovery, or even coming into possession in collusion with the tenant in possession, has no effect against a person claiming wholly adversely to the limitations; he does not claim under any act either done or suffered by any of the tenants in tail. The words of the Act are, moreover, less strong than those of 34 & 35 Hen. 8, c. 20, which speaks of acts done or suffered "by *or against*" the tenant in tail; and the only word which seems to support the plaintiff's contention, the word "discontinuance," is a technical description of acts done by the tenant, such as a feoffment, which took away the right of entry of the issue. The whole effect of the clause relied upon is to prevent the operation of acts to which the tenants in tail were parties. The case of *Cannon* v. *Rimington* (2) has really no bearing on the present case; the proposition, however, there laid down (3), that the plaintiff would have been barred if the tenant in tail had merely abandoned possession during his life, and which is adopted by Lord St. Leonards in the 2nd edition of his work on Real Property, pp. 34 and 35, illustrates the difference between the position of the present defendant and that which he would have occupied if he had come in under the late Earl.

Waley, in reply. At the date of 2 & 3 Ph. & M. there was no Statute of Limitations applying to anything but real actions; there was no statute barring entry. The word "discontinuance," therefore, was intended to prevent any action by or against a tenant in tail by which a succeeding tenant in tail would be barred from entry.

Cur. adv. vult.

(1) 3 B. & P. 565.

(2) 12 C. B. 1, 18; 21 L. J. (C.P.) 137; S. C. in Ex. Ch. 12 C. B. 18; 22 L. J. (C.P.) 163.

(3) 12 C. B. at p. 16.

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EARL OF ABERGAVENNY *v.* BRACE.

Jan. 23. The following judgments were delivered:—

CLEASBY, B. In this action of ejectment the lands sought to be recovered form part of the lands comprised in a private Act of Parliament. That Act, which was passed in the session held in the 2nd and 3rd years of Philip and Mary, disabled the successive tenants in tail from doing any act by which the reversion of the Crown or the interest of any succeeding tenant in tail could be barred; and therefore, notwithstanding any fine levied or recovery suffered by a tenant in tail, a succeeding tenant in tail might, upon his becoming entitled in possession, enter. But the question which arises in the present case is, what is the effect upon the interest of a tenant in tail of a third person having had undisputed possession of land comprised in that Act for more than twenty years during the life of a previous tenant in tail, and after a right to enter accrued to that tenant in tail; and this depends upon the operation of the statute 3 & 4 Wm. 4, c. 27, when applied to the estates comprised in the Act before referred to.

The Act 2 & 3 Ph. & M. was no doubt a private Act, being applicable only to the particular estates referred to. Still it is a law relating to the lands, and complete effect must be given to it. So that it appears clear, that if any tenant in tail aliened the land by fine or recovery, or by the disentailing deed which is now substituted, the title of the succeeding tenant in tail would not be affected.

In the case of an ordinary tenancy in tail it seems clear that if a tenant in tail is dispossessed, or in any other way has a right of entry, and more than twenty years elapse before any proceedings are taken, either during his own life or during the lifetime of successive tenants in tail, an action of ejectment to recover the land is not maintainable at the suit of any tenant in tail. The case of *Cannon* v. *Rimington* (1), and the same case in error, place this beyond dispute, if it were not so upon the words of the Act of Parliament. In that case a tenant in tail had made a feoffment of the land to a third person, and more than twenty years elapsed during his life without any interruption of the possession of the feoffee or those claiming under him, and upon a succeeding tenant in tail taking proceedings, it was contended by the defendant that the plaintiff was barred by the statute; but the Court held that though, if the tenant in tail had been dispossessed, and so had a right of entry for more than twenty years, his successor would be barred, yet as he by his feoffment deprived himself of his right of entry during his life, the statute did not apply. The Lord Chief Justice of the Common Pleas says, in the written judgment of the Court (1):—"No doubt, if the tenant in tail had voluntarily abandoned his interest during his life, and had remained out of possession for twenty years, the issue in tail would have been barred; but although there may be an apparent hardship in the case, and a difficulty in understanding why in principle such a distinction should exist, we are of opinion that the 21st section does not apply to this case, and that the right of a tenant in tail to make an entry or bring an action to recover the land cannot be barred by reason of the same not having been made or brought, in a case where the tenant in tail has conveyed away his own right, and has put it out of his power to make an entry or bring an action." And this view was distinctly adopted by the Court of Error. So that the matter to be considered is, what is the effect of the Act of Parliament upon a tenancy in tail such as that of the Abergavenny estates, as distinguished from an ordinary tenancy in tail.

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(1) 12 C. B. 1; 20 L. J. (C.P.) 137; S. C. in Ex. Ch. 12 C. B. 18; 22 L. J. (C.P.) 153.

It cannot be contended that, in consequence of the limitation imposed upon them, the successive holders of the estate are not to be regarded as tenants in tail at all. The limitation of the estate to the heirs of the body of the persons named necessarily makes each succeeding holder of the estate a tenant in tail, and what follows comes as a proviso upon that estate. And the Master of the Rolls expressed an opinion in the case, *In re Cuckfield Burial Board; Ex parte Earl of Abergavenny* (2), that Lord Abergavenny was tenant in tail of the Abergavenny estates within the Lands Clauses Consolidation Act, though, as he also thought the Crown was not barred by that Act, nothing was finally decided.

One question argued before us was, whether the case of a tenant in tail, whose ancestor has been out of possession for more than twenty years, was governed by the 2nd section of the Limitation Act, or by the 21st section. The learned counsel for the plaintiff contended that it was properly governed by the 21st section; on

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(1) 12 C. B. at p. 16.

(2) 19 Beav. 153; 24 L. J. (Ch.) 585.

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the contrary the defendant relied upon the 2nd section; and there is a difference in the language of the two sections. The 2nd section, where there has been a right of entry for more than twenty years to any person through whom the claimant claims, takes away the right to bring an action; and the 1st section (which is the interpretation clause) makes the ancestor of issue in tail the person through whom the issue claims; so that, although the case of a tenant in tail is not expressly referred to in the 2nd section, it may be brought within it by the effect of the interpretation clause.

The 21st section, on the other hand, expressly provides for the case of tenant in tail; and the enactment is, that if tenant in tail loses the right by lapse of so many years, then every person claiming a right, which the tenant in tail could lawfully have barred, loses the right also. And it was contended that, as the tenant in tail of the Abergavenny estates could not lawfully bar his successor, the plaintiff was not barred. And if the succeeding tenant in tail could only be barred in the case put by virtue of the 21st section, I should think the statute of Philip and Mary would prevent the section from applying.

In the judgment of Parke, B., in *Cannon* v. *Rimington* in error (1), the case of tenant in tail is considered as coming under s. 21; but bearing in mind that the 21st section applies, not only to a succeeding tenant in tail, but to all estates in remainder or reversion after the estate in tail (which the tenant in tail, being in possession, could undoubtedly have barred), and so accomplishes an object not contemplated or provided for by the 2nd section, I should hesitate in saying that the 21st section takes the case of tenant in tail out of the operation of the 2nd section, and decline to decide the case on that ground.

But assuming that Lord Abergavenny is tenant in tail, and that the case of an ordinary tenant in tail comes within the 2nd section, yet a further question arises, viz., whether the tenancy in tail created by the Act of Philip and Mary is a tenancy in tail within the meaning of the Limitation Act, so as to make a right of entering in one tenant, if not asserted for twenty years during his life, deprive the succeeding tenant in tail of the estate; in other words, whether the Limitation Act, in dealing with estates tail, contemplates and is applicable to such a limited tenancy in tail as that of the Abergavenny estates.

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(1) 12 C. B. at p. 34.

There are strong reasons for saying that it is not. In the first place a tenancy in tail is a well-known estate in lands which has long had known incidents, one being that a tenant in tail in possession can by his own act lawfully bar the estate of the succeeding tenants in tail, and it may be argued with great force, that when an Act of Parliament speaks in general terms of an estate tail, it signifies that well-known estate, and does not include an estate tail which is only exceptionally so, and has none of those known incidents.

Secondly, the 21st section of the Act, which deals expressly with estates tail, shews by its language that such tenancies in tail were intended as gave the tenant in tail in possession power of barring succeeding estates; and it may be fairly argued that, as this important section in dealing with estates tail clearly contemplates only ordinary estates tail, it is a proper conclusion that other parts of the Act, so far as they deal with estates tail, have reference to the same estates. And in furtherance of this, it is a sound argument that there is an obvious reason for making the non-assertion of right by the tenant in tail bind the succession in ordinary cases, viz., that as the estate was in his power, it was unimportant whether the subsequent estate was barred by the exercise of power, or by the passive lying by of the tenant; but this reason is wholly inapplicable in such cases as the estate in question, where the tenant has no active power. The conclusion would be, that the enactment should be regarded as inapplicable when the reason for it ceases altogether; more especially when adequate effect can be given to it by applying it to those cases to which the reason for it applies.

Thirdly, the argument of the defendant, founded upon the 2nd section, and the interpretation clause, is answered as soon as we can properly conclude that the word "issue in tail" in the last-mentioned clause, refers to the ordinary estate tail with its usual incidents. The introductory words of that clause (s. 1) declare it shall be applicable except where the nature of the provision or the context of the Act shall exclude such construction. I feel warranted in the conclusion that the nature of the provision, viz., barring the successor by non-claim, and the context, viz., the 21st section already referred to, prevent the tenant in tail of the Abergavenny estate from claiming through his ancestor, so as to come within the operation of the 2nd section. Of course any one who claims as issue of the ancestor claims through him in one sense, as in the ordinary case of a settlement upon A. for life, with remainder to his first and other sons successively in tail; each of the sons would claim through A. in one sense, as being of his blood, but that is not the legal meaning of the term. In general, each succeeding tenant in tail would, I apprehend, claim per formam doni, and that is the position of the tenant of the Abergavenny estate; but the interpretation clause extends the meaning of the term "claiming through," and makes it applicable to tenancies in tail, that is, as I think, estates known in general as tenancies in tail with their ordinary incidents.

A further argument was addressed to the Court, which, if it be well founded, is also decisive of the case, and is deserving of full consideration. It was to the effect that by the enactment of the statute of 2 & 3 Ph. & M. the neglect or default of any tenant in tail, if dispossessed, to make his claim, does not prejudice the right of the succeeding tenant in tail when his right accrues; and cases were referred to, and the analogy of those cases relied on; in other words it was said, that the reasons given in those cases were generally applicable to the present. One of these cases, *Stratfield* v. *Dover* (1) was decided upon the statute 34 & 35 Hen. 8, c. 20. By that statute, if the king made a gift in tail as a reward for services with reversion in himself, a tenant in tail was disabled from barring the estate of his successor. The words are, "that after the death of any such tenant in tail against whom any such recovery shall be had, the heirs in tail may enter, have and enjoy the lands, tenements, and hereditaments so recovered, according to the form of the gift of entail; the said recovery or any other thing or things hereafter to be had, done, or suffered by or against any such tenant in tail to the contrary notwithstanding."

In the case referred to the question arose, whether, if a tenant-in tail of such land was disseised, and the disseisor levied a fine with proclamations, and five years elapsed, the succeeding tenant in tail was barred. It is clear that in the case of an ordinary tenant in tail such a fine and lapse of five years would bar the succeeding tenant in tail, by the effect of the Statute of Fines, 4 Hen. 7, c. 24: Co. Litt. 372 a.; and therefore the question which arose in the case was, whether the fine of the disseisor and the non-claim of the tenant in tail for five years was something "had, done, or suffered by or against such tenant in tail," within the Act of Parliament. As to the decision in this case, it is said that Coke made a mistake. In dealing with the statute in question, he says (Co. Litt. 373 a.): "Ninthly, where the said latter words of the statute be 'had, done, or suffered by, or against any such tenant in taile,' the sense and construction is, where tenant in taile is partie or privie to the act, be it by doing or suffering that which should work the barre, and not by mere permission, he being a stranger to the act. As if tenant in taile of the gift of the king, the reversion to the king expectant, is disseised, and the disseisor levie a fine, and five years passe, this shall barre the estate taile."

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(1) Moore, 467; Cro. Eliz. 595.

And if the case was decided as supposed by Coke, and was an authority to be followed, it would, so far as the argument now considered is concerned, be decisive against the plaintiff. But there is good reason for supposing that Coke was mistaken. There is a MS. note of Lord Nottingham, which is given in Butler's note to the passage (note 325), from which it appears that Coke was himself appealed to on the subject, and that the roll of the judgment was produced to him, and that he admitted that he had been misled by the person who had reported the case to him. (1) And it seems decisive upon this matter that in a subsequent case of *Magdalen College*, decided 12 Jac. 1, the case of *Stratfield* v. *Dover* was referred to in the judgment of the Court (2), as follows: "*Stratford* v. *Dover.*—Tenant in tail, reversion to the king being by gift of the king is disseised, and suffers five years to pass after fine levied by the disseisor; still it seems this fine shall not bind the issue by the word *suffer* in the statute."

The other case referred to in the argument was the *Magdalen*

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(1) See post, p. 167, n.

(2) 1 Roll. Rep. at p. 171, sat nom. *Warren* v. *Smith.*

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College Case (1) already mentioned, which was a decision upon the effect of the disabling clause in the statute 13 Eliz. c. 10. By the 3rd section it is enacted that "all leases, grants, conveyances, or estates made, had, done, or suffered by any master, or any fellows of any college, other than for the term of twenty-one years or three lives, shall be utterly void." The facts were, that the master and fellows of the college had conveyed to the queen in fee; she had conveyed to Spinola in fee; Spinola conveyed to the Earl of Oxford; a fine was then levied with proclamations, and more than five years elapsed. The master of the college died and a fresh master was chosen; and the question was, whether the masters and fellows were then barred by the fine, and this depended on whether fine and non-claim were to be considered as a grant, conveyance, or estate, made, had, done, or suffered by the master and fellows. The case is reported in 1 Roll. Rep. p. 151, under the name of *Warren* v. *Smith* or *Magdalen College Case*, and also in 11 Co. 66 b. (*Magdalen College Case*). The case was much debated upon several questions which arose, and among other conclusions, according to the report in Rolle, at p. 171, it was resolved by the whole Court, that the fine and non-claim shall not bar the successor, but shall be void against him by the statute 13 Eliz., because the words of the statute are, that acts done or suffered shall be void against the successor, and this non-claim is a sufferance and therefore directly within the words of the statute. And Haughton, J., says, "If this fine and non-claim was not void by the 13 Eliz. the statute would be of little effect, for then the colleges might suffer strangers to enter upon them and levy a fine, and five years to pass, and so defeat the statute." And the 3rd resolution of the Court as given by Coke (11 Coke, 78 b.), is as follows:—"As to the third general point, it was resolved that the said fine and non-claim by five years should not bar the right of the said college, for two reasons: 1. The words of the Act of 13 Eliz. are, 'That all leases, gifts, &c., conveyances, and estates, had, made, done, or suffered by any master and fellows, &c.' So that in the case at bar, there is a conveyance and estate 'permitted or suffered by the master and fellows of the said college;' and that these words shall not be extended only when the master and fellows suffer a recovery, &c.,

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(1) 11 Co. Rep. 66 b.; 1 Roll. Rep. 151.

against themselves, as party thereunto, but generally according to the letter, when they suffer others to levy a fine with proclamations, and suffer also five years to pass without claim; and although the conclusion of the purview of the Act is, 'shall be utterly void and of none effect to all intents, constructions and purposes,' yet by construction it shall be so taken that the said fine levied with proclamation, &c., shall be void and of none effect, to bind the right of the master and fellows of the said house; and it would have been of none effect to have prohibited them to bar the right of their colleges by conveyances made by the master and fellows themselves, and to have left them power by their permission or sufferance and non-claim to bar it; and to that purpose these words 'permitted or suffered' were added."

These judgments have been somewhat fully referred to for the purpose of shewing that, according to them and the reasons given, proper effect could not be given to the words used without making them embrace, not only acts done but acts permitted, and that the word *suffered* is not to be limited to any technical meaning, such as a recovery suffered, but is to be extended in its meaning so as to carry into effect the object of the Act.

Now the words of the statute in question are similar, and, if anything, more extensive. They are, "No feoffment, discontinuance, fine, or recovery, or any other act or acts thereafter to be made, done, suffered, or acknowledged of the said lands . . . should bind or conclude in right, or put from entry the succeeding tenant in tail." Here we have the words "act or acts, made, done, suffered," and all the grounds of the judgment and the sound reasons given in the cases referred to, apply to those words.

In the first cited case the words are, "any thing or things done or suffered;" and the decision was founded upon the fine and non-claim being something permitted and suffered. In the other case, the words were, "all conveyances and estates done or suffered;" and the resolution, as given in Rolle, was that the non-claim was a sufferance. The decision, as given by Coke, is to the same effect, and he gives the reason, which is quite applicable to the present case, viz., "It would have been of none effect to prohibit them to bar the right by conveyances, and to leave them power by their permission and sufferance and non-claim to do so." The

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argument on the other side, founded upon a close examination of the words and their technical meaning, was strong in those cases, as it is in this, but the reason last given is an irresistible answer to that argument.

I can see no solid distinction between an estate suffered to be gained by uninterrupted possession, as in the present case, and an estate suffered to be gained by non-claim, as in those cases. In each case the successor's estate is not to be prejudiced by the act done or suffered by the predecessor, and during the life of the predecessor the successor was incapable of acting, and therefore no party to what was going on.

As to the particular language of this Act of Parliament, "any act to be done or suffered of the said lands," in giving effect to the general words it would be no straining of their meaning to read them, "of and concerning or relating to the said lands," if this were necessary; but we have here an act, viz., the actual possession of the lands by a stranger for twenty years, suffered and permitted, just as the fine and non-claim were suffered and permitted in the other cases.

No doubt in the cases referred to, the words are made applicable to something known at the time, and which it might therefore be said was contemplated, but when general words are used following particular words, they are not in ordinary construction restrained to things which could at the time be enumerated, but extend to things which are within the words, and are of the same nature and character as those which might be enumerated. So that if the statute had contained the words "all neglects and defaults," it would not have been confined to such neglects only as worked a prejudice at the time of the statute passed, but would include those of a like nature which had the same effect afterwards.

As to the argument that the later public Act of 3 & 4 Wm. 4, c. 27, includes all cases, and must prevail against the earlier private Act of Philip and Mary, this would in effect be to make the general statute, 3 & 4 Wm. 4, c. 27, operate as a repeal of the earlier particular statute, contrary to the usual rule. If the earlier statute applied to all property, there would be much in the argument; but there is nothing to shew, either in the preamble or elsewhere, any intention to interfere with exceptional enactments affecting par-

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ticular estates. On the contrary, the language of s. 21, as to the estates which the tenant in tail might bar, would shew that the cases really contemplated were not such cases as the Abergavenny estates.

It cannot be denied that there is a great inconvenience in setting aside an undisturbed possession, however long (which might have lasted for more than one generation), in favour of a new tenant in tail. But the argument ab inconvenienti is much less strong when applied to an exceptional and peculiar case than when applied to a class of cases. And in reality the Abergavenny estate would, among all persons connected with it, be marked and known as different from other estates, in having a strict parliamentary entail, and they would deal with it, knowing that no good title could be made or acquired as against a succeeding tenant in tail.

Although I feel that the law cannot be set aside upon this ground of convenience, it may be a good reason for the legislature removing such an anomaly, with the consent of the Crown and of all parties interested.

The learned counsel for the plaintiff referred to the Acts of Parliament settling Blenheim and Strathfieldsaye on the Dukes of Marlborough and Wellington (5 Anne, c. 3, & 54 Geo. 3, c. 161). And it was asked, whether the neglect of any duke for twenty years to enforce his right to those estates, or a part of them, could deprive the succeeding duke of the right to them. It may be said in answer, that it would be considered that those Acts, which in terms provide those estates for the support of the dignity and dukedom (s. 2 of the latter Act), annex them for all time thereto, so that any person succeeding to the dukedom would be entitled, by force of the Acts, to succeed to the estates. But it is worthy of remark (taking as an instance the later Act) that it has a section (s. 28) introduced for the express purpose of carrying this object into effect, and preventing any duke from prejudicing the interest of his successor, and that the words used are, that no duke for the time being shall have power, "by fine or recovery, or by the exercise of any power, or by any other act, assurance, or conveyance in the law, to discontinue the estate of, or to hinder, bar, or disinherit" his successor from the estates, or any part thereof;

which words are less comprehensive than those of the Acts before referred to.

The conclusion at which I have arrived is, that the proper legal effect must be given to the enactment of the statute 2 & 3 Ph. & M.; and that such effect cannot be given to it, in accordance with the authorities referred to, without making it reserve the right of any succeeding tenant in tail, notwithstanding an estate gained by uninterrupted possession for twenty years, through the permission or sufferance of the ancestor.

It is deserving of remark, that if we were to hold the plaintiff barred by the non-assertion of right by his ancestor, we should really place the Abergavenny estates, comprised in the Act of Parliament, in a worse position as regards alienation than all the other entailed estates in the kingdom. For we all know that by means of recoveries (now disentailing deeds) the estates are re-settled in each generation, and the effect is that each tenant in tail becomes, before he has an estate in possession, tenant for life with remainders to his children in succession in tail; so that the succeeding tenant in tail, instead of succeeding as tenant in tail, succeeds as remainderman in tail after an estate for life; and thus his estate is secured. For it is clear that the non-claim or non-assertion of right by the predecessor would not affect the title of the son succeeding. But the process of resettlement is not properly applicable to the Abergavenny estates, as each succeeding tenant would succeed to the estate, not by virtue of the disentailment and resettlement, but by virtue of the Act of Parliament. The result of our holding that the defendant was entitled to succeed in this case would be, that any tenant in tail of those estates might place any stranger in possession of the mansion and any portion of the property as tenant at will, and if he lived twenty years after the expiration of the first year, the person succeeding to the title would be deprived of the property. The right of entry accrues, and the statute begins to run at the expiration of the first year after the creation of a tenancy at will (3 & 4 Wm. 4, c. 27, s. 7), and thus any tenant in tail might create a tenancy at will in any one by his own act and do nothing for twenty-one years, and if he lived so long he would have disposed of the property. There would be nothing collusive or colourable in this, because the tenant in tail might in this way lawfully and properly create an adverse estate binding upon himself, and the question whether it is binding upon the successor depends, not upon his intention, because he had no power over the estate, but upon the proper construction of the Act of Parliament. It might be said that in that case there is an act done, viz., the creation of a tenancy at will; but what distinction is there between creating a tenancy at will and suffering such a tenancy, or a tenancy by sufferance, to continue? The word *suffer* in the statute removes the distinction, if there was any without it. I think the sound construction of the statute (which I am bound to deal with as with any other statute) is to make it extend to conduct of the tenant, by which he creates adverse estates.

The tenant in tail of the Abergavenny estates may by his conduct create adverse estates binding upon himself, but not, I think, upon his successor.

Upon both the grounds above given, it appears to me that judgment should be given for the plaintiff.

CHANNELL, B. This case was argued before my Brothers Bramwell and Cleasby and myself. It is an action of ejectment, and it is agreed that the plaintiff is entitled to recover possession of the lands in question unless he is barred by the Statute of Limitations; and also, that he would be barred by the Statute of Limitations if this had been only an ordinary estate in tail.

It is contended, however, that the estate of the plaintiff in respect of which, if at all, he is entitled to recover, is such that no Statute of Limitations applies to bar his remedy. It will be convenient therefore to consider, first, the statute 2 & 3 Ph. & M., by which the estate of the plaintiff was created, to see what construction must have been put upon the statute at the time it was passed, and then to see how, if at all, the Statutes of Limitation subsequently passed have affected the matter.

To ascertain the construction which must have been put upon the statute when it passed, it is convenient to notice the general state of the law at the time upon the various matters in reference to which doubts arise, and also the position of the Neville family which gave rise to the statute.

In the first place, ordinary estates tail would at that time be

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barred by act of the tenant in tail, but estate tail ex provisione regis, that is, estates tail conferred by the sovereign in reward of services, and in which the sovereign had a reversion or remainder, could not be so barred, such bar being contrary to the then recent statute 34 & 35 Hen. 8, c. 20, the statute which had to be considered in the case of *Stratfield* v. *Dover*, which I shall have to mention hereafter. In the first section or preamble of that Act, the reasons for such restraint upon alienation are set out.

In the next place, there was no existing statute of limitation as to the time within which a right of entry must be exercised, except in the case when a fine had been levied with proclamations. The first statute containing any general enactment limiting the time for exercising rights of entry was the 21 Jac. 1, c. 16. The Statute of Limitations existing in the year 2 & 3 Ph. & M. was 32 Hen. 8, c. 2, which related solely to actions.

In *Bevill's Case* (1), decided upon that statute in the year 17 & 18 Eliz., "It was resolved that although a man has been out of possession of land for sixty years, yet if his entry is not tolled, he may well enter and bring an action of his own possession." In that case the enactments of each section of 32 Hen. 8, c. 2, are gone into, and it is pointed out that none of them apply to a right of entry.

The statute 4 Hen. 7, c. 24 (according to which fines, when duly levied with proclamations, bound strangers to the fine as well as privies, unless they pursued their claim by action or by lawful entry within five years) was, however, to a certain extent of the nature of a Statute of Limitations, and it would bar a right of entry, and was the only existing statute which would do so.

There is one other statute, 32 Hen. 8, c. 33, which perhaps should be mentioned as having a bearing upon the question of the time within which rights of entry must have been exercised. By this statute it was enacted, that a right of entry should not be taken away by the death of a disseisor, unless five years had elapsed since the disseisin. This was not, of course, exactly in the nature of a statute of limitations, being a benefit to the disseisee, whose entry, but for the enactment, would have been tolled by the descent cast, whether five years had elapsed or not.

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(1) 4 Co. Rep. 8 a., at p. 11 b.

In this state of things the statute 2 & 3 Ph. & M., which we have to construe, passed. By the attainder of one Edward Neville, certain rights had passed to the Crown, and by a previous Act of restitution Edward Neville, the son, had been restored and enabled in blood and, to some extent, in estate. The object of the Act in question was to deal with certain estates devised by the will of the then late Earl of Abergavenny, in which the attainted Edward Neville had an interest, and to which Edward Neville, the son, had not been restored by the act of restitution.

In effect a grant was made by the Crown of these estates, which had passed to it by the attainder, to certain Nevilles and the heirs male of their bodies, and a reversion was reserved to the Crown on the failure of such heirs male; and although there is nothing said expressly about the services of the favoured Nevilles, yet it cannot be doubted that the policy of the Act, in providing a restraint on alienation, was the same as that set out in the preamble of 34 & 35 Hen. 8, c. 20, above referred to, and that the intention was to create a restraint on alienation at least as strong as that Act. In fact, the words used to create the restraint on alienation appear to be, if anything, stronger than in that Act. In 34 & 35 Hen. 8, c. 20, they are, "no such feigned recovery, . . . shall bind or conclude the heirs in tail, whether any common voucher shall be had in such feigned recovery or not, but . . . the heirs in tail may enter, have, and enjoy the lands, &c., the said recovery or any other thing or things hereafter to be had done or suffered by or against such tenant in tail to the contrary notwithstanding."

In the Act in question, 2 & 3 Ph. & M., the words are, "and that no feoffment, discontinuance, fine nor recovery, with voucher or otherwise, or any other act or acts hereafter to be made, done, suffered or acknowledged of the premises, or of any part or parcel thereof," by the favoured Nevilles or by any of the heirs male of their several bodies, &c., "should bind or conclude in right or put from entry" the sovereign, "or any of the heirs in tail, or any to whom the premises or any parcel thereof should descend, revert, remain, or come by virtue of the will."

Now, I believe it has never been suggested that these words are not sufficient to prevent any alienation by any express act of any tenant in tail of the estates in question; the sole question of doubt is, whether they extend to prevent the operation of such neglect of any tenant in tail, as would, but for the words in question, bar the issue in tail by virtue of the Statutes of Limitation.

Now, as to this, it seems to me that, according to the law in force at the time the statute passed, it prevented alienation of the estates (except, of course, for the life of any particular tenant) both by neglect and by express act.

The word "discontinuance" is, of course, the appropriate one to denote any act of a tenant in tail in possession which would "toll" the right of entry of the issue and put him to his real action; but I do not think that the words which follow, viz., "put from entry," are to be applied solely to the word discontinuance. It is not "no discontinuance shall put from entry or other act bind or conclude in right."

The word "suffered," also, I think, applies generally to the foregoing words and not to recovery only, to which, perhaps, it is most applicable. The use of the word "suffered" seems necessarily to imply that the act may be the act of some one else, and not of the tenant in tail. If no act suffered by the tenant in tail was to put the heir to entry, it seems to follow that no neglect of the tenant in tail could defeat the right of the issue any more than his express act could. I have pointed out that there was, when this statute passed, no enactment by which mere lapse of time took away entry.

It is scarcely necessary to go through all the cases in which, according to the old law, a man was put to his real action and could not enter. Taking, perhaps, the most common case of a disseisin and descent cast, there must in the first instance have been something to create the disseisin, which would not be inaptly described as an act suffered.

It is quite true that, according to the present Statute of Limitations, the question of the plaintiff losing his right depends, as my Brother Bramwell puts it, not upon the defendant being in, but upon his (the plaintiff's) being out; that is to say, not upon "act," but upon "want of act." But this was not at all the case before the present statute. Even under the statute of James I., the possession of the defendant must have been adverse in order to bar the right, while under the law previous to that there must be, to begin with, before the lapse of time became important at all, something to take away the right of entry.

It seems to me, therefore, that the argument fails which is founded on the fact that, although there were Statutes of Limitation in existence when this statute passed, no words are introduced apt to exclude the operation of a Statute of Limitations. It seems to me that although there are no words very apt to exclude the operation of the present Statute of Limitations, yet there are words apt to exclude the operation of such Statutes of Limitation as were in existence at the time.

The question as to whether words such as those in this statute extend to cases of neglect by the tenants in tail of acts of others, as well as acts to which the tenants in tail are themselves parties, is not without authority. I have mentioned the statute of Henry VII. as to strangers to a fine as well as privies being bound by the fine after five years non-claim. Of course, if any tenant in tail of these estates had been a party to such a fine, it is clear that by the express words of the statute it would not have bound the heir. Supposing him not to have been a party to it, he himself would have been bound after five years non-claim; but would the heir? This depends upon the question whether this statute, in speaking of "fine or other act done or suffered," includes the case of an act of another person neglected, and in that sense suffered; and anything that is an authority upon the one question is an authority upon the other.

The first of the authorities on the point is *Stratfield* v. *Dover.* (1) As to this case, I think there can be no doubt but that the correct report of it is that in Moore. The report in Cro. Eliz. is really to the same effect as that in Moore, because it is there said, at the end of the report, that upon the second argument it was adjudged for the defendant. (2) There is, therefore, only the

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(1) Moore, 467; Cro. Eliz. 595.

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(2) This note, which does not appear in the early editions, seems to be only a statement by the editor of the result of what is reported at p. 612, as follows:—

"The case was now moved again by Williams that the pleading was ill: For the defendant made conusance as bayliff of Ed. Verney; for that King Edward IV. gave the land to the ancestors of Ed. Verney in tail, and conveyed it by descent to Ed. Verney. The plaintiff said, that Fr. Howse, before the taking, was seised in fee, and in 25 Eliz. levied a fine with proclamamarginal statement in Coke upon Littleton to the contrary, and I think that, taking into consideration the statement from Lord Nottingham's MSS. given in the notes to Butler's edition of Coke upon Littleton, no weight ought to be attached to this marginal statement. I do not see any ground for saying that Lord Coke thought the case wrongly decided. Taking the report in Moore to be correct, *Stratfield* v. *Dover* is a decision that, in a case coming within 34 & 35 Hen. 8, c. 20, the issue in tail were not barred under 4 Hen. 7, c. 24, by a fine with proclamations, followed by non-claim for five years.

I have already given the words of the statute 34 & 35 Hen. 8, c. 20, and I can see no difference between them and the words in the Act of Philip and Mary now under consideration. In the one case the important words are "thing suffered," in the other "act suffered."

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tion, and five years passed; and that this fine was to the use of Fr. Howse himself and his heirs, who let to the plaintiff for years, &c. *And for this cause* it was insufficient; for he never traverseth the gift in tail, nor the seisin in tail in Ed. Verney nor in his ancestors, nor confess nor avoids it. Wherefore, *without regard to the matter in law,* it was adjudged for the defendant." On reference to the Roll (1914) it appears that this account of the pleadings is correct, except only that the plea to the conusance alleged Fr. Howse *and his wife* Margaret to have been seised in fee, and whilst so seised to have levied a fine to the use of Francis and Margaret and the heirs of Francis. It further appears that in Trin., 39 Eliz., the Court took time to consider, that the case was further adjourned in Michaelmas and Hilary following, and that judgment was given for the defendant in Easter term.

It is plain therefore that when Moore says (467), "Walmsley, Justice, says that that issue only is bound in whose time the fine is levied, but no other issues, and that by statute 32 Hen. 8, and 34 Hen. 8," he is merely relating what took place on the first argument, when also according to Croke's report (595), Walmsley, J. differed from Anderson and the other justices; and there seems no reason to distrust Croke's further report at p. 612, for it is possible that if the Court could not satisfy themselves upon the substantial question, they may have taken advantage of the technical defect in pleading in order to avoid a disagreement. This would of course not appear upon the roll, and therefore Lord Coke's admission of error (as stated in Lord Nottingham's MSS.) proves nothing; he was wrong in supposing the case *decided* to the effect stated at Co. Litt. 373 a., but he was equally wrong in supposing (if he did suppose) it to be decided to the contrary effect, and he was right (according to Croke) in thinking that the opinion of the majority of the Court was in favour of the plaintiff upon the matter of law.

Next comes the *Magdalen College Case* (1), decided upon the construction of 13 Eliz., c. 10; there the words of the statute are not so nearly like those of the present statute as the words of 34 & 35 Hen. 8, c. 20. They do not, however, seem stronger. They are "all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, or suffered by the master," &c., shall be utterly void. It was held that a fine and non-claim for five years did not bar the claim of the college after a new master had been appointed.

The reasons given as to this (see 11 Coke, 78 b.) go to the full length of establishing that an estate not interfered with when the right to do so exists is an estate "suffered;" a doctrine which, if correct, seems to conclude the present case, unless some subsequent statute has altered the effect of the one we are considering. These authorities seem to dispose of any possibility of the heirs in tail of these estates settled by the Act 2 & 3 Ph. & M. being barred by fine and non-claim under the statute of 4 Hen. 7. If so, I do not see, looking at the law in force at the time, any other kind of neglect which would not be equally "an act suffered."

On the whole, therefore, I come to the conclusion that the estates were made in the first instance inalienable absolutely, and that the right of the issue in tail could not have been defeated by the neglect of their predecessor any more than by his express act.

The estates conferred by this act upon the successive tenants are therefore, as was suggested upon the argument, much more like successive life estates than ordinary estates tail. It is, however, probably correct to call them estates tail deprived of an ordinary incident of such estates. Such estates, though of course exceptional, are not unknown to the law, as the statute 34 & 35 Hen. 8, c. 20, shews, and also the modern instances of Blenheim and Strathfieldsaye. The restriction upon alienation of such estates is expressly recognized by the 18th section of the Fines and Recoveries Act. (3 & 4 Wm. 4, c. 74.) Whether estates tail of this peculiar description and the persons entitled to them would be included by general expressions such as "estates tail," "heirs," "heirs in tail," "issue in tail," and the like occurring in other statutes, would be a matter to be determined in each case by consideration of the purview of

(1) 11 Co. Rep. 66 b.

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the statute, the context in which the words occurred, and other like matters. Being, if estates tail at all, estates tail of an entirely exceptional character, they would not necessarily be referred to by the use of the general expression "estates tail." In some cases, doubtless, they would be included, as in the provision in the Lands Clauses Act (8 & 9 Vict. c. 18, s. 7), the application of which to these very Abergavenny estates was discussed before Lord Romilly in *In re Cuckfield Burial Board; Ex parte Earl of Abergavenny.* (1) The very object of that enactment was to provide for cases in which alienation was restricted, and not where it was possible without assistance, and, therefore, these estates naturally were held to be within the section. Further, life estates are there mentioned as well as estates tail, and it does not appear within which description Lord Romilly considered these Abergavenny estates to come. That case, therefore, cannot be taken to be an authority that these estates are necessarily included in the description "estates tail" in a modern statute.

As a general rule, subsequent statutes of general application are not to be taken as applying to particular and exceptional cases under former statutes, unless there is something to shew an intention that they should apply.

With these remarks as to the manner in which the subsequent statutes are to be looked at, I pass to the question whether there is anything in any Statute of Limitations passed subsequently to 2 & 3 Ph. & M., which causes the heir in tail of these estates to be barred by the neglect of his ancestors to enforce their rights. The statutes are only two; the 21 Jac. 1, c. 16, and the present statute, 3 & 4 Wm. 4, c. 27. As to the first of these (21 Jac. 1, c. 16), I do not think much turns upon it. I have already pointed out that adverse possession was required to bring into operation the enactment contained in it, so that something more than mere "want of act" on the part of a person entitled to enter was required in order to bar his right. I can see nothing in this Act to shew that it was intended to apply to such estates as were created by 2 & 3 Ph. & M. It has, of course, been held that it applies to ordinary cases of estates tail, and in the case of a claim by an heir in tail, the twenty years begins to run from the time that the right accrued to his ancestor, and not from the time when he himself succeeded to the right. This was held in *Cotterell* v. *Dutton* (1), and *Tolson* v. *Kaye*. (2) This seems to have proceeded very much upon the words "such persons not entering, and their heirs," shall be excluded, &c. But in ordinary cases a person can defeat any right of his heirs to an estate tail as well as to an estate in fee simple, and by the use of the word "heirs," it seems to me that only persons whom he can defeat can be supposed to be meant. These successive tenants in tail are, of course, heirs of their ancestors, and, in a sense, they get the estate because they are heirs; but they are not heirs in the sense in which the word is ordinarily used, because they are persons over whose right the ancestor has no power.

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(1) 19 Beav. 153; 24 L. J. (Ch.) 585.

The last statute (3 & 4 Wm. 4, c. 27) is the most important one; upon the construction of this statute the principal question argued before us was, whether the 1st and 2nd or 21st and 22nd were the governing sections upon the question of the barring of the claims of heirs to estates tail by lapse of time. Now, of course, if the 21st and 22nd sections are the only ones applicable, it is clear that the present plaintiff is not barred, for his estate is not one which his ancestor, in whose time the time began to run, could have barred. It seems to me, however, that the 2nd section (taken with the 1st, the interpretation clause, and the cases of *Cotterell* v. *Dutton* (1), and *Tolson* v. *Kaye* (2) above referred to, and decided upon 21 Jac. 1, c. 16), is sufficient to bar an ordinary estate tail. The more immediate object of the introduction of the 21st and 22nd sections was to provide for the estates in reversion and remainder, subsequent to the estates tail.

The great importance of those sections, however, in reference to the present case, seems to me that they are explanatory of the policy of the whole Act. They seem to shew that it was meant that, wherever a person with the present right to the possession of property could dispose of the estate by his express act, neglect on his part such as would bar his own right should amount to a disposition of the estate, and bar also those who came after him. I do not, however, find any case where this Act enables a man to do indirectly by his neglect anything which he could not do directly

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(1) 4 Taunt. 826.

(2) 3 Br. & B. 217.

by his act. Therefore, although I think an ordinary tenant in tail would, by virtue of the 1st and 2nd sections lose his right after twenty years want of possession in the time of his ancestor, yet I do not think the present plaintiff, whose estate tail is so exceptional, is in the same position.

I think an ordinary tenant in tail must be considered as claiming through his ancestor, by virtue of the 1st section, which says that the expression, "person through whom another claims," shall mean, "any person by, through, or under, or by the act of whom," another "became entitled as . . . . issue in tail." Now the present plaintiff in no sense really became entitled by, through, or under his father, or by his act, although an ordinary heir in tail, whose estate might have been barred, might be said to do so. I have said that I think the question whether such an expression as "issue in tail" includes a person having such an estate as the plaintiff's is a question to be decided in each case by the context and the purview of the Act in which it occurs. Neither here nor in the statute 21 Jac. 1, c. 16, can I find anything to shew an intention to allow a person to do indirectly that which he cannot do directly, and therefore I think that general expressions cannot be construed to include such an estate as the plaintiff's.

The *Magdalen College Case* (1) seems to me a strong authority against permitting a statute to be evaded by indirect means, as would happen if the issue in tail, under this entailing statute, could be barred by the neglect of their ancestor. I am satisfied that it was not the intention, when the statute passed, that there should be any such indirect means of alienation; and although the statute is an old one, and to modern notions produces somewhat inconvenient results, yet we have nothing to do with that. We have only to construe it; it is part of the statutory law of the land, and it requires the authority of the legislature to alter it.

In my opinion judgment should be for the plaintiff.

BRAMWELL, B. The plaintiff, and those under whom he claims, have been seised of an estate in tail male in lands, of which those in question are a part. But he and they have been out of possession more than twenty years (not all in his time), under such circumstances that the 3 & 4 Wm. 4, c. 27, is a bar to this action, unless prevented from so being by the statute of 2 & 3 Ph. & M. relating to this estate.

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(1) 11 Co. Rep. 66 b.; 1 Roll. Rep. 151.

The first point made for the plaintiff was, that his estate and that of his predecessors was not an estate tail, but that each successive owner had an estate for life only, by operation of that statute. But I think it is an estate tail, deprived by the statute of one of the ordinary incidents, viz., that the entail can be barred, and the heirs in tail and the remaindermen cut off: *In re Cuckfield Burial Board; Ex parte Earl of Abergavenny.* (1) It was next contended by the plaintiff that the case was governed, not by s. 2, but by s. 21 of 3 & 4 Wm. 4, and that as this estate could not be barred by the tenant in tail, the case was not within the statute. But it seems to me clear that the case is governed by s. 2. The words are, "No person shall bring an action to recover any land, but within twenty years next after the time at which the right to bring such actions shall have first accrued to some person through whom he claims." Surely the heir in tail claims through his ancestor. Further, s. 21 supposes that the right of the tenant has been barred by the preceding sections, for it says that when the right of the tenant in tail to bring an action is barred by reason of the same not having been brought within the period hereinbefore limited, no action shall be brought by any person claiming any estate which such tenant in tail might lawfully have barred. This must mean estates other than the estate tail, viz., estates in remainder and reversion: *Tolson* v. *Kaye.* (2) Further, it is not clear to me that s. 21 does not mean that where the general nature of the estate is such that remainders could be barred, then twenty years' want of possession should bar. That is to say, s. 21 means that the owners of all such estates in remainder as are of such a nature that an ordinary tenant could bar them, shall lose their title by lapse of twenty years with no possession by tenant in tail. Be this as it may, I think s. 2 applies, and that the plaintiff on both these points fails.

The defendant, on the other hand, contended that this provision of the statute of 2 & 3 Ph. & M. was void or inoperative, as a restriction contrary to law or repealed. But it is a restriction created by law, by statute, and is valid. Nor can it be said to be abrogated or repealed by statute 3 & 4 Wm. 4, c. 27, assuming the two statutes to be inconsistent; first, because general posterior laws do not abrogate prior particular ones; secondly, Statutes of Limitation were in force when the statute of Philip and Mary passed, and the present statute is in continuation and confirmation of them, though more extensive. I think the defendant is wrong on these points.

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(1) 19 Beav. 153; 24 L. J. (Ch.) 585.

(2) 3 Br. & B. 217.

The question, then, turns on the statute of Philip and Mary; what is its effect in connection with the then and now existing Statutes of Limitation? Those in force before the passing of the statute of Philip and Mary were applicable to these lands, and but for it would have barred this action; and the question really is, whether that statute repealed them quoad this land. For if they would not have been repealed by that statute, and would have barred this action, it will hardly be denied that 3 & 4 Wm. 4, c. 27, which comprehends the effect of all these provisions, would not also be a bar. I say this is the question. But it seems to me that had those Statutes of Limitation never existed, this statute might be a bar; because it is not a statute contradicting or repealing 2 & 3 Ph. & M., but collateral to it. On the other hand, I think it must be admitted that if the Statutes of Limitation in force at the time of the passing of 2 & 3 Ph. & M. were within its provisions, and pro tanto repealed by it, this present Act of 3 & 4 Wm. 4, c. 27, is also not applicable to cases within 2 & 3 Ph. & M., and this action is not barred by it. I proceed to examine this question.

On the defendant's side are justice and convenience. If the plaintiff is right, a person with a 200 years' title to an estate might be deprived of it by its being shewn that it was once a part of these estates governed by the statute of Philip and Mary. Nothing could be more mischievous and unjust. The statute of Philip and Mary was to govern the rights of the Nevilles and those who might claim under them by grant, as against heirs in tail, remaindermen, and the Crown; and not to alter a general law or rule of law for the benefit of those who might claim adversely to the Nevilles and the Crown, viz., the law of limitation. Further, there is the probability that the statute meant to guard against voluntary acts or omissions, not against forgetfulness, thinking it not necessary to guard against that, and trusting that the owners would not forget to their own prejudice. I may observe here that no collusion is suggested between the plaintiff or his predecessors and the defendant, only omission or forgetfulness; it is not as though there was an intentional being out of possession for twenty years. Further, if it had been intended that the Statutes of Limitations then existing should not apply to these estates, it would have been easy to have said expressly that they should not, or by the use of general words excluded their operation.

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Now let us examine the very words in the Act of Philip and Mary. They are that, on failure of issue male of certain persons, then the queen and her successors should have the lands, and no feoffment, discontinuance, fine or recovery, with voucher or otherwise, or any act or acts thereafter to be made, done, suffered, or acknowledged of the premises, or any part or parcel thereof, by the named persons or their heirs male should bind or conclude in right or put from entry the said queen, &c. Now, do any of these apply to a case where the Nevilles do nothing, but are out of possession during a certain lapse of time? The particular words are "feoffment, discontinuance, fine, or recovery." The only general words are "other act or acts." Is lapse of time, is absence of possession, an act or acts of any kind? Even if "acts," must not the acts be acts ejusdem generis with feoffment, discontinuance, fine and recovery? Is not this confirmed by the words "made, done, suffered, or acknowledged," and especially by the words "of the premises or part thereof by the said Henry Neville, &c.?" Is it possible to say that lapse of time and continuing out of possession are an act or acts made, done, suffered, or acknowledged of this part of the premises by the plaintiff, and those he claimed under? I think not. It is to be observed the plaintiff loses his title, not because the defendant is in, but because the plaintiff is out of possession; not from an "act" of his, but from want of "act," viz., entry or suit. On these considerations I should hold, that neither did the words comprehend the loss of the estate by a want of possession for a length of time, nor was it intended, or the object to include such a case, and unless there was some binding authority to the contrary, I should give judgment for the defendant.

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The cases relied on to the contrary are *Stratfield* v. *Dover* (1), and the *Magdalen College Case.* (2) *Stratfield* v. *Dover* (1) turned on the 34 & 35 Hen. 8, c. 20; the words there are, "The said recovery or any thing or things hereafter to be had, done, or suffered by or against any such tenant in tail to the contrary notwithstanding." In the case of *Stratfield* v. *Dover* (1), decided on that statute, the tenant in tail was disseised; the disseisor levied a fine; five years passed. There was some ground to hold, as they did, that this was a "thing" suffered by or against the tenant. The words are very different from those of the statute governing this case. But it is to be observed that Lord Coke cites this case as decided the other way, and not only cites it with no disapprobation as so decided, but the contrary, and gives a most cogent reason for the decision he supposed. He says, Co. Litt. 373 a.—"ninthly, where the said latter words of the statute be 'had done or suffered by or against any such tenant in taile,' the sense and construction is, where tenant in taile is partie or privie to the act, be it by doing or suffering that which should worke the barre, and not by meere permission, he being a stranger to the act. As if tenant in tayle of the gift of the king, the reversion to the king expectant, is disseised, and the disseisor levie a fine, and five years passe, this shall be barre the estate taile; and so if a collaterall ancestour of the donee release with warrantie, and the donee suffer the warrantie to descend without any entry made in the life of the ancestour, this shall binde the tenant in tayle, because he is not partie or privie to any act, either done or suffered by or against him." It may be said, therefore, that we have this authority that that case was ill decided. (3)

The words in 13 Eliz. c. 10, s. 3, which governed the *Magdalen College Case* (2), are, "all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered," &c. Now, there the master and fellows had, by indenture enrolled, granted a house in fee rendering rent; afterwards the assignees of the grantee levied a fine, and the master of the college accepted the rent, and five years elapsed. Now surely in that case this state of things was made, had, done, suffered by the college. But for their voluntary act the fine could not have been effectually levied, and they

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(1) Moore, 467; Cro. Eliz. 595. (2) 11 Co. Rep. 66 b.; 1 Roll. Rep. 151.

(3) See ante, p. 167, n.

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voluntarily received the rent, and allowed the five years to go by. It is true that in the judgment the non-claim is relied on as the thing suffered, but it is also spoken of as an intentional and voluntary non-claim, and an evasion of the statute. Anyhow the words are very different from those in the Act of Philip and Mary in this case, which speak of an act made, done, suffered, or acknowledged of the premises by the Nevilles or their heirs.

I am therefore of opinion that those cases do not govern the present, and that our judgment should be for the defendant.

Judgment for the plaintiff.

Attorney for plaintiff: *J. T. Marshall, for Walford & Gabb, Wallingford.*

Attorneys for defendant: *Walker & Martineau.*

Jan. 19.

ATTORNEY-GENERAL AND KENNEDY AND TURNER v. BARKER AND HODGSON.

Prerogative of Crown—Right of Sovereign to Injunction to Restrain Action—Manorial Rights—Custom of Manor.

4 Ex D 173.

The Queen, as lady of a manor, granted to two licensees, in pursuance of certain alleged manorial rights, power to enter the lands comprised in the manor and search for and carry away minerals, making to the copyholder and terre-tenant respectively a customary compensation for surface damage. The licensees entered without the consent of either copyholder or terre-tenant and began mining operations; whereupon the terre-tenant commenced an action of trespass against them. The Attorney-General, on behalf of the Queen and the licensees, then filed an information and bill on the equity side of the Exchequer against copyholder and terre-tenant, praying that the rights of the Crown within the manor should be declared, and that the action of trespass should be restrained. On an application for an injunction in accordance with the prayer of the information and bill:—

Held, that the rights of the Sovereign being involved in the proceedings in the action, the Sovereign was entitled *jure coronæ* to be actor in any litigation affecting those rights, and that the injunction must therefore issue.

THIS was an application to restrain an action of trespass brought by the defendant Hodgson against the plaintiffs Kennedy and Turner under the following circumstances:—

The Queen is lady of the manor of Muchland, in the county of Lancaster. The defendant Barker is one of her Majesty's tenants of a parcel of the manor called Leece Farm, and the defendant

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Hodgson is terre-tenant of that farm under a lease granted to him by Barker for a term of fourteen years from the 14th of February, 1866. There are within the ambit of the manor minerals which belong to the Queen as lady of the manor, and she claims by herself or her licensees, to be entitled to search for and find those minerals, either by mining or quarrying, without the consent of the owner or occupier, making a reasonable customary compensation to them respectively for all surface damage. The compensation alleged to be fixed by custom is, to the terre-tenant three yearly rentals, and to the owner of the soil twice the agricultural value of the land ; in case of disagreement either as to rental or agricultural value, the same to be settled by arbitration.

On the 3rd of November, 1870, the Queen leased by deed to Messrs. Kennedy and Turner all the ironstone which might be found under a specified portion of land within the manor of Muchland, and parcel of Leece Farm, for one year from the previous 10th of October, with authority to search for and carry away the ironstone, paying to the Queen a royalty of 1*s.* 3*d.* per ton of 2240 lbs. weight. Messrs. Kennedy and Turner, acting in pursuance of the powers granted to them, entered upon the defendants' land, called Leece Farm, without the consent of the defendants, and began mining operations. The defendant Hodgson, at the instance of the defendant Barker, thereupon commenced an action of trespass in this court against them, and endorsed the writ with notice of his intention to claim an injunction against the continuance of the trespasses. The now plaintiffs Kennedy and Turner appeared to the writ, and the declaration was, on the 18th July, 1871, delivered. The defendants entered an appearance, and were subsequently, by a change of attorneys, represented by the solicitor of the Land Revenue department. On the 31st of July, before plea pleaded, the present proceedings by information and bill were commenced, in which the Attorney-General, on behalf of her Majesty and the plaintiffs, prayed, 1st, for a declaration of her Majesty's rights in the manor of Muchland, and of the customs of that manor with respect to compensation for surface damage, and, 2nd, for an injunction to restrain the defendant Hodgson from further prosecuting the action of trespass commenced by him against Kennedy and Turner. On the 4th of August an application for an injunction was

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made to Cleasby, B., at chambers, and by him referred to the Court, all proceedings in the action being meanwhile stayed, and the mining operations of Messrs. Kennedy and Turner suspended.

Sir G. Jessel, S.G. (*W. W. Karslake* with him), moved for an injunction accordingly. This application is made on behalf of the Queen, who, both as lady of the manor and Sovereign, has a right to an injunction. Apart from any question of prerogative, that right exists upon the general principles which govern a Court of equity. The action pending on the plea side of the court could not definitively settle the rights of the parties, and where that is the case, the party against whom the action is brought or whose rights are involved in it, may have an injunction. If, therefore, Messrs. Kennedy and Turner were licensees of a subject, that subject would be entitled to restrain the action and to a declaration and establishment of his rights by bill in equity. But however this may be, the Queen is entitled *jure coronæ.* Wherever the rights of the Crown are touched the Crown has a right to be actor.

[He cited *Phelps* v. *Prothero* (1); *Frank* v. *Basnett* (2); *Levy* v. *Lindo* (3): *Reynolds* v. *Nelson* (4); *Attorney-General* v. *St. Aubyn* (5); *Leonard* v. *Rogers* (6); *Attorney-General* v. *Reveley.* (7)

Manisty, Q.C., and *Herschell*, contrà. In this case the Court is asked, as a court of equity, to remove a purely legal question from the plea side where an action has already been actually commenced. There is no power to do this, unless some equitable right is involved in the decision of the action at law. But here the information simply asserts a legal right in the lord of the manor which he can set up through his tenant in the action, and if the application were made by a subject, it would certainly be refused on the ground that a court of law has power to deal with and determine the whole matter in dispute, and no purely equitable question is directly or indirectly in issue. Secondly, the application cannot be sustained by virtue of the royal prerogative. No authority exists in support of a prerogative which empowers the Crown to take away from a

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(1) 7 De G. M. & G. 722; 25 L. J. (Ch.) 105. 9 Jur. N.S. 173.

(2) 2 My. & K. 618.

(3) 3 Mer. 81.

(4) Madd. & Gel. 290

(5) Wightw. 167.

(6) Wightw. at p. 204, cited in *Attorney-General* v. *St. Aubyn.*

(7) Reported by W. W. Karslake, London, 1870.

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subject his right to enforce his rights in the ordinary way by action. [They cited *Cawthorne* v. *Campbell* (1); *Attorney-General* v. *Hallett* (2); *Hammond's Case* (3); *Lamb* v. *Gunman.* (4)]

Sir G. Jessel, S.G., in reply. The action will not decide the right of the Queen to search for and win the minerals without the consent either of owner and terre-tenant; nor the question of customary compensation; nor the power of the Crown to grant its right to licensees. Therefore a bill similar to this might be maintained by a subject, and that, although an action has already been commenced: *Warrick* v. *Queen's College* (5); *Mayor of York* v. *Pilkington* (6); *Duke of Beaufort* v. *Glynn* (7); *Powell* v. *Lloyd* (8); *Hudson* v. *Bartram* (9); *Annesley* v. *Muggridge* (10); *Kell* v. *Nokes.* (11) And as to the prerogative right of the Crown to be actor, the case of *Attorney-General* v. *Hallett* (2) distinctly recognizes its existence in revenue cases, and the same principle is applicable here.

KELLY, C.B. There can be no doubt that this is a question of considerable importance, and if, after the able argument which has been addressed to the Court on both sides, and I may say especially the argument of Mr. Herschell, any serious doubt could be entertained, I should require time to consider before thinking it right to deliver judgment; but when we look to the principle of cases of this nature, I cannot think that the question which is now submitted to us is open to any reasonable doubt.

It appears that the Queen is lady of the manor of Muchland, and in that character is entitled to the mines and minerals under the lands throughout the manor; and more, she claims the right, to which it may be she is entitled, not only to search, and to take the mines and minerals when the access to them is open, but to search in the lands of the different tenants of the manor for mines and minerals, without consent, making compensation in a peculiar form, and of a peculiar character.

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(1) 1 Anstr. 205.
(2) 15 M. & W. 97.
(3) Hardr. 176.
(4) Parker, 143.
(5) Law Rep. 6 Ch. Ap. 716.
(6) 1 Atk. 282.
(7) 3 Sm. & G. 213.
(8) 1 Y. & J. 427.
(9) 3 Madd. 440.
(10) 1 Madd. 593.
(11) 32 L. J. (Ch.) 785.

Such being the circumstances of the case and the claim made on behalf of the Queen, it appears that a lessee of the Crown has entered upon the lands of a tenant of the lady of the manor, and that that tenant has commenced an action of trespass in this court against the lessee of the Crown, and seeks to recover damages by reason of the entry upon the land, and the damage done to the land; the defence to this action being that the defendant was the lessee of the Crown, and that he entered by virtue of the custom to which I have adverted, and under the authority of the Crown, to search for minerals under the land in question, making such compensation as he was liable to make according to and in pursuance of the terms of the custom.

These being the facts, the first proceeding that took place was that certain persons authorized by the Crown for that purpose came in and claimed to defend in that action; and if no new proceeding had been instituted, the effect would probably have been that that action would have proceeded, and the question exclusively raised in that suit would have been determined in this court. But the Crown, since the persons acting under the authority of the Crown have entered an appearance in that action, has instituted this suit, in which the Attorney-General prays that the rights of the Queen as lady of the manor, and this custom as claimed by the Queen to exist in this manor, should be established by a decree of this Court.

When we look at the prayer of the bill it involves all the questions of right and of custom which could be raised in the action which has been brought; and the consequence, therefore, of allowing that action and this suit to proceed, would be that at one and the same time the question of these rights and customs might come to be determined before a judge and a jury in this court, and by this court, under the prayer of this bill, sitting as a court of equity to determine and to pronounce a decree in this suit. Under these circumstances I can entertain no doubt upon the general doctrine of courts of equity, that an injunction ought to be granted to stay the proceedings in the action, and that the questions raised should be determined in this suit.

The chief objection that has been made to this application is that it is in effect a mere application to stay the proceedings

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permanently in an action, and to remove a legal question, and one which is the proper subject for a court of law, into a court of equity, without any equitable question arising in conjunction with the legal question raised, or without any question arising in the court of equity which would necessarily draw to it the question which has been raised by the action in the court of law.

Now, when we come to look at the nature of the claim made in the present suit, we find it is a claim by the Queen, as lady of the manor, to certain manorial rights, with an allegation that certain customs existed in this manor which the Crown desires to have established by a decree of this Court, and such a suit is certainly maintainable by the Crown, although it raises the very same questions which are raised in an action in which the Crown is the real defendant, though not the defendant on the record.

I do not propose to consider whether, this being so, the present suit might have been instituted and maintained by any lady of the manor, not under or by virtue of the prerogative. Undoubtedly the cases that are referred to in *Warrick* v. *Queen's College* (1), and the decision in that case itself, when taken together with the decision of the *Mayor of York* v. *Pilkington* (2), go far to shew that a suit of this kind might be well maintained by a subject. I do not pronounce, however, any opinion on that point. Here the Crown is the plaintiff in the suit, and, on principle and authority, I feel bound to hold that the Crown has at any time a right to insist upon its claim to land, or upon its right to the establishing of any customs belonging to a manor, by means of a suit instituted by the Crown itself, and is not bound to abide the event of any action or suit in which the Crown, through a subject, is made the real defendant, and can only appear as defendant. Without going through the cases in detail, it is sufficient to say that the case of *Leonard* v. *Rogers*, referred to in *Attorney-General* v. *St. Aubyn* (3), is a distinct decision upon the point.

This suit, then, can be maintained. I do not refer to its particular form; it differs but little from the form of the suit instituted in this court in the case of *Attorney-General* v. *Reveley*. (4)

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(1) Law Rep. 6 Ch. Ap. 716.

(2) 1 Atk. 282.

(3) Wightw. at p. 204.

(4) Reported by W. W. Karslake, London, 1870.

That was indeed a suit in the nature of a writ of intrusion; but in substance it was an English bill by the Crown through the Attorney-General claiming a title to mines and minerals under certain lands of a manor of which the Crown claimed to be the lady. If therefore there be a right in the Crown to bring and maintain such a suit as this, it follows as a matter of course that if in the proceeding in that suit, and before a decree can be pronounced, a certain specific question arises in which the rights of the Crown are involved, and that question is the subject of an action at law, the Crown, as plaintiff in the suit, is entitled to apply for an injunction to restrain further proceedings in the action.

Accordingly, without praying in aid the fact that this is a suit not merely against the plaintiff in the action, but against the landlord who is also tenant of the manor, and that therefore questions might arise which would not arise in the action, and parties might be interested who would not be parties to the action, I am of opinion that the injunction sought for should be granted.

CHANNELL, B. I am of the same opinion. I consider that we are sitting as a court of equity, our jurisdiction being preserved in the case of an English bill. The bill that now originates our jurisdiction is an information filed by Her Majesty's Attorney-General on behalf of the Crown, and with the concurrence of Messrs. Kennedy and Turner, who are licensees for a period of one year of the right which the Crown claims to have. I enter into no discussion as to what possibly may have been the rights of lords of the manor with whom the Crown was not in any way connected, and I address myself entirely to the nature and scope of this information filed on behalf of Her Majesty.

Now Mr. Manisty's argument went to shew that in his judgment a manifest inconvenience would arise from having a question that might have been tried efficiently at law brought under the jurisdiction of a court of equity. The question of inconvenience is not to be lost sight of, but it is not to prevail where the jurisdiction of a Court of equity is, as I think it is here, clear. The case of *Attorney-General* v. *Hallett* (1) decided some points not at all

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(1) 15 M. & W. 97.

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unfavourable to this view. In the first place, it decided that the Crown had a right to interfere and exercise some control, and that upon a mere suggestion of the Attorney-General made at the bar that the Crown had an interest. It decided further, that the Crown might, to a certain extent, control the proceedings already instituted, and might remove them from one court to another; i.e., in that particular case into the plea side of this court from the Court of Common Pleas; subject to this only, that if it was content to remove the proceedings, it should take the matter up at the stage in which it then existed.

It is true that to decide that the Crown had that right does not decide that the Crown has the right now claimed, but there is nothing in that decision inconsistent with the Crown possessing the larger right which is asserted here. I cannot doubt therefore that this information is maintainable; and that upon a demurrer the information would be held to prevail.

The next point is whether or not the question which the Court has jurisdiction to dispose of upon this information is involved in the action brought at law. The rule in equity as to this is, that where the Court has jurisdiction over the subject-matter of the suit, and that subject-matter is involved in an action at law, it will not allow the two proceedings to go on at one and the same time. So it is laid down in Fowler's Exchequer Practice, 2nd ed., p. 217, where the writer, speaking of an injunction which the Court of Exchequer upon an English bill grants, says: "It issues by the order and under the seal of the Court, and not on account of any supremacy which this Court assumes over a court of law, but in respect of its original jurisdiction as a court of equity, by which it controls the party and not the Court from proceeding at law in the particular case made by the bill till the defendants shall have fully answered it, and this Court have made further order."

Now I am clearly of opinion that the question which is involved in this information is raised in the action which has been brought in the Exchequer of Pleas, and that if that is so, it would be enough to warrant us in issuing this injunction.

But I am disposed to go somewhat further than that, and to say, that although what is raised in the information is also raised in the Exchequer of Pleas, the information raises some points which the action in the Exchequer of Pleas will not determine. For example, the landlord of Hodgson, who is the plaintiff in the action, is no party to that proceeding at all, and his rights and remedies must be dealt with; it is important for the Crown to ascertain them. He is a copyhold tenant, but also the landlord of Hodgson, the tenant who has brought this action. And again, I am not satisfied that the action, if prosecuted to its termination, would decide the question whether or not the licensees for one year, Messrs. Kennedy and Turner, would have the right of renewal. I apprehend that that question may be determined in the court of equity, and would not of necessity arise in a court of law; there it might depend somewhat upon the pleadings. Therefore, though I see clearly that at least one of the points involved in this information is involved in the action at law, I am not at all sure that the information might not call for a decision upon matters which the action would not determine.

Upon these grounds then, first, that the suit is clearly maintainable; secondly, that if it be maintainable, the Court of equity having jurisdiction over the subject-matter will restrain the trial in another court at one and the same time of that question which as a Court of equity it has a right to decide; and partly from a belief that the action in the court of law could not determine all that could be determined in the court of equity, I think that this injunction should go.

Cleasby, B. I am of the same opinion, and I will add but a very few words. There seem to be two questions involved. The first is, whether it is clear that this is a case in which this Court as a Court of equity, entertains jurisdiction, so as to be justified in pronouncing a decree in compliance with the prayer of the bill. If it is, does it follow that the action at law ought not to go on? Now with respect to the first question, if it were put forward as a general proposition, that where there was an action at law brought to try a custom, the defendant in that action might file a bill praying that the custom should be declared, and by that act entitle himself to an injunction to restrain the action at law, and I had to answer that question broadly put, I should have no hesitation in answering it in the negative; but if I had had to answer it in an exceptional case, a peculiar case such as has been mentioned, a bill of peace, which, I think, is generally called a "bill of peace to prevent multiplicity of suits," or any other exceptional or peculiar case, then I should certainly have required some time before I should have felt myself justified in giving an answer. But, as it appears to me, that question does not arise in this case at all, because I have understood it to be a general rule of law that where the title of the Crown to property comes in question, the Crown has the right to prevent that title being decided in any suit between subjects, and is entitled to have it decided in a proceeding to which the Crown itself is a party.

This being so, this bill is, in my opinion, a proper mode of proceeding; and it is sanctioned by the case which has been referred to of *Attorney-General* v. *Reveley*. (1) And without going into what the Solicitor-General has dwelt upon as to this bill embracing several matters which, to a certain extent, would enlarge his right to call for the interposition of this Court as a Court of equity in granting an injunction, it is certain that one essential part of it is to try this custom, and to have it declared what the custom is. It seems to follow as a necessary matter in the administration of justice, that the same proceeding should not go on in two courts at the same time, one of which is able to deal with the question completely, and the other only to ascertain the amount of damages to which the person aggrieved is entitled. Therefore, I entirely agree with the conclusion to which the rest of the Court has come.

Injunction granted.

Attorney for informants: *Solicitor to Land Revenue.*

Attorneys for defendants: *Cunliffe & Beaumont.*

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(1) Reported by W. W. Karslake, London, 1870.

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Prohibition—Court of Admiralty—Jurisdiction—Suit for Limitation of Liability — Injunction against Action — Arrest of Ship or Proceeds — Money Equivalent to Proceeds — Payment into Court—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 514—24 *Vict. c.* 10, *s.* 13.

The Court of Admiralty, although it possesses by statute in certain cases some of the powers of a superior Court, is an "inferior" Court, to which prohibition will lie.

The 24 Vict. c. 10, s. 13, enacts that when a vessel or the proceeds thereof are under arrest, the Court of Admiralty may entertain a suit for limitation of liability in the same manner as the Court of Chancery may entertain it, under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 514:—

Held, that the vessel or her proceeds must be under arrest at the time of the institution of the suit, and the payment into court afterwards, by the shipowner, of 15*l.* per ton on the registered tonnage of the ship under the Merchant Shipping Act, 1862, s. 54, will not give the Court jurisdiction.

The plaintiff, with his luggage, was a passenger on the 17th of March, 1870, from London to Guernsey by the defendants' railway and steamer. On the voyage to Guernsey the steamer came into collision with another vessel and sank, and the plaintiff thereby lost his luggage and sustained personal injury. He then brought an action for damages against the defendants in this court. On the 7th and 21st of May cross causes of damage were instituted between the defendants and the owners of the other vessel, and 5000*l.* was paid into court by the defendants, in lieu of bail. Afterwards, on the 30th of May, the defendants commenced a suit for limitation of their liability to 15*l.* per ton, being the maximum fixed by the Merchant Shipping Act, 1862, s. 54, submitting to bring that sum into court, if they were found to blame in the suits for damage. The owners of the other vessel denied the jurisdiction of the Court to entertain the suit, on the ground that at the time of its institution neither the steamer nor her proceeds were under arrest. On the 4th of June the judge ordered, in general terms, that all actions arising out of the collision should be stayed, the plaintiffs [the now defendants] undertaking to admit liability if the judge should pronounce against them in the damage suits. On the 14th of July the judge pronounced that he had jurisdiction; that the defendants were entitled to limited liability, and were liable in respect of loss or injury to the amount, if at all, of 6376*l.*, being at the rate of 15*l.* per ton on the registered tonnage of the steamer, and ordered that sum to be paid into court; and on the 4th of August the defendants paid it in, and admitted liability unconditionally, having on the 30th of July been held in the damage suits to be solely to blame for the collision. On the 22nd of November the defendants made an application to the Court of Admiralty for a specific injunction against the plaintiff's action. The plaintiff then commenced proceedings in prohibition:—

Held, that the Court of Admiralty had no jurisdiction to entertain the suit for limitation of liability, or to grant an injunction restraining the plaintiff, inasmuch

S.C. in Chy where it was held that the Merchant Shipping Act 1854 did not apply to the case (London & S.W. Ry Co v James) as neither the ship nor the proceeds, nor anything equivalent to the proceeds, were under arrest at the time of the institution of the suit, and that the prohibition must therefore issue.

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DECLARATION in prohibition, stating that at the time, &c., the defendants were common carriers of passengers, with their luggage, from London to Guernsey, and the plaintiff was received by them to be carried with his luggage from London to Guernsey, and they promised to carry him safely for reward to them, and did safely carry him on his way as far as Southampton; but whilst he was being carried thence to Guernsey, on board a ship called the *Normandy,* that ship, by the defendants' negligence, came into collision with the *Mary,* and was so damaged that it sank, and the plaintiff was thereby cast into the water and injured, and lost his luggage; that afterwards he brought an action in the Exchequer for damages in respect of the premises, and declared against the defendants in the words following: [Here followed the declaration which was in the ordinary form for negligence, and claimed damages for the loss resulting to the plaintiff from the collision]; that the defendants pleaded not guilty, and as to the loss of luggage, that it was delivered to them to be carried subject to the condition that they should be exempt from liability for damage caused by dangers of the seas, and the loss of the luggage was caused by such dangers; that the plaintiff joined issue on these pleas, and on the 11th of June, 1870, gave notice of trial; that after pleas pleaded, the defendants, on the 30th of May, commenced a suit for limitation of liability in the Court of Admiralty, entitled *The Normandy,* No. 5366, against the owners of the *Mary,* and all persons interested in the *Mary* and *Normandy,* or having any right or claim arising out of the collision between the two vessels; that afterwards, on the 9th of June, the defendants filed a petition in that suit, which stated the following facts: That the London and South Western Railway Company [the now defendants] were, before and on the 17th of March, 1870, owners of the *Normandy,* a steamship with a registered tonnage of 425·05 tons; and at midnight on the 16th of March the *Normandy* left Southampton for Guernsey, having on board passengers [among whom was the now plaintiff] and cargo, and on her voyage came into collision with the *Mary,* and sank; that many of her passengers and the whole cargo were lost in consequence of the collision, and that the *Mary* was also damaged and part of her cargo lost; that cross causes of damage were instituted on the 7th of May and 21st of May respectively, and numbered 5347 and 5359, between the owners of the two vessels, each party alleging that the blame of the collision belonged to the other, and in the suit against the *Normandy* 5000*l.* in lieu of bail was paid into court on the 30th of May; that actions had been brought, and were expected to be brought, against the South Western Railway Company for loss of life, and loss of or damage to goods; that the value of the *Normandy* at 15*l.* a ton was insufficient to satisfy the claims in those actions; that the South Western Railway Company undertook that "if the Court, in the cross suits numbered 5347 and 5359, should find the *Normandy* to blame, either wholly or in part, they would admit liability in all other actions or suits; and the judge was prayed to pronounce the company not liable either in respect of loss of or damage to goods, or loss of life, or personal injury, to an amount exceeding 15*l.* a ton, and to allow the company to pay that sum, with interest, into court, and to stay proceedings in all actions or suits except the cross causes for damage.

That the owners of the *Mary* filed an answer on the 29th of June, denying the jurisdiction of the Court of Admiralty, neither the *Normandy* nor her proceeds being under arrest at the institution of the suit, and there being no absolute admission of liability on the part of the South Western Railway Company; and on the 2nd of July the company replied, alleging that if the *Normandy* was solely to blame, or was to blame jointly with the *Mary*, they did not deny their liability; but that, if the *Mary* was solely to blame, they did deny it.

That after issue joined and notice of trial given, the defendants served the following order of the Admiralty Court, made without notice to him or his being heard against the same:—

"4th June, 1870. *Normandy*, 5366. The judge, after hearing counsel, &c., ordered that all actions and suits pending in other courts in relation to the subject-matter of this suit, to wit, the liability of the owners of the *Normandy* in respect of loss of life, or personal injury, or loss or damage to ships, goods, &c., on the occasion of a collision which occurred on the 17th of March, 1870, between the *Normandy* and *Mary*, be stopped, the plaintiffs (the

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London and South Western Railway Company) undertaking to admit liability in all such actions or suits as soon as this Court shall have pronounced for the damage proceeded for in the cause entitled *The Normandy* (5359) or a moiety thereof."

That, on the 14th of July, 1870, the judge, in the suit numbered 5366, pronounced (1), "That the Court has jurisdiction to entertain this cause, and that the owners of the *Normandy* are entitled to limited liability according to the Merchant Shipping Acts, 1854 and 1862, and that in respect of loss of life or personal injury or of loss or damage to ships, goods, merchandise, or other things, caused on the occasion of the collision between the *Normandy* and *Mary*, the owners of the *Normandy*, if answerable, are only answerable in damages to an amount not exceeding 6376*l.*, such sum being at the rate of 15*l.* per ton of registered tonnage of the *Normandy*, without deduction on account of engine-room; and he ordered that the owners of the *Normandy* do forthwith pay 6376*l.* into court, with interest;" that afterwards the defendants applied to the Court of Admiralty for a further injunction to restrain the plaintiff from proceeding with his action; that neither the ship nor her proceeds were at the commencement of the suit, or at the time of the decree or order or application, under arrest; and that the plaintiff was a stranger to the proceedings in the Court of Admiralty, and no citation or process was served on him other than the order of the 4th of June, 1870; that the cognizance of the suit numbered 5366 belongs not to the Court of Admiralty, and that Court had no power to entertain that suit or the application for an injunction or to make any order or injunction restraining the plaintiff or his action, yet that the defendants still prosecuted their suit, and their application for an injunction to the plaintiff's oppression, wherefore the plaintiff prayed a prohibition, &c."

Plea: That the defendants were carriers as alleged by railway to Southampton, and thence to Guernsey, and received the plaintiff with his luggage to be safely and securely carried, as such carriers, and not otherwise; that the allegations in the petition, dated the 9th of June, in the suit for limitation of liability, were true; that on the 31st of May the defendants' proctors moved

(1) See *The Normandy*, Law Rep. 3 A. & E. 152.

for an injunction to stay all actions pending in relation to the collision, and on the 2nd of June an appearance in the cause for limitation of liability was entered for the owners of the *Mary;* that on the 4th of June the Court of Admiralty made the order in the declaration alleged; and on the 14th of July gave judgment for the defendants (the plaintiffs in that cause), and made the order of the 14th of July in the declaration set forth; that on the 30th of July the two causes of damage between the *Normandy* and *Mary* and the *Mary* and *Normandy* were heard, when judgment was given against the defendants, and they were decreed solely to blame for the collision; that on the 4th of August, the defendants paid into court 6376*l.* with interest, and admitted their liability; that thereupon all such proceedings were taken as were prescribed by the statutes in such behalf, and by the practice of the Admiralty Court, and the Court declared a certain period for claimants in respect of the collision to come in and prove their claims; and on the 11th of November, the plaintiff entered an appearance under protest, and obtained an extension of time to come in and prove his claim; that on the 22nd of November the defendants moved the Court of Admiralty to restrain this action, and the Court took time to deliberate; that meanwhile the rule nisi for this prohibition had been granted, whereupon the judge of the Admiralty Court declined to make any order; that the plaintiff had notice of all the proceedings mentioned in this plea, and might have intervened at any time and applied for a dissolution of the injunction; and that the plaintiff was a defendant in that suit, and ought to have come in and proved his claim, wherefore the defendants submit that the cognizance of the suit, called the *Normandy*, No. 5366, belonged to the Court of Admiralty, and that Court had authority to entertain the petition, and to restrain this action.

Demurrer and joinder. (1)

Jan. 17, 25, 26. *Manisty, Q.C.* (*W. G. Harrison* with him), for the plaintiff. The Court of Admiralty has no jurisdiction to entertain the suit or issue an injunction staying the plaintiff's action. The only authority which that Court has in such a case is under 24 Vict. c. 10, s. 13, and as a condition precedent to its exercise liability must be admitted; *Hill* v. *Audus* (1), and the ship or its proceeds must be under the arrest of the Court. The ship *Normandy* was not under arrest, for it had foundered, nor were the proceeds either actually or constructively. The Court could not give itself jurisdiction, after suit commenced, by ordering a sum of money to be paid into court to represent the ship. Again the Court has no power to interfere with an action on a contract made on land, to carry goods partly by land and partly by water. This prohibition ought therefore to issue. It may be contended that, the Admiralty Court being now for some purposes a superior court, no prohibition will lie. But the Court still remains, except in the cases specified by statute, an inferior court, and therefore one to which a pro-

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(1) The following sections of the Merchant Shipping Acts of 1854 and 1862, and of the Admiralty Court Act, 1861, are material:—The 17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854), s. 504, limits the shipowner's liability at the value of ship and freight, which is not, in case of loss of life or personal in-

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jury, to be taken at *less than* 15*l.* a ton. But this enactment is modified by 25 & 26 Vict. c. 63, s. 54 (Merchant Shipping Act, 1862), which limits the shipowner's liability "in respect of loss of life, or personal injury either alone or together with loss or damage to merchandise," &c., at 15*l.* a ton. [It will be observed that by the last-mentioned statute, 15*l.* a ton is the *maximum* of liability.]

The 17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854), part ix. s. 514, enacts that "in cases where any liability has been or is alleged to have been, incurred by any owner in respect of loss of life, personal injury, or loss of, or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then . . . it shall be lawful in England or Ireland, for the High Court of Chancery . . . to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability . . . and for the distribution of such amount rateably among the several claimants, with power . . . to stop all actions and suits pending in any other court in relation to the same subject-matter; and any proceeding entertained by such Court of Chancery . . . may be conducted in such manner, and subject to such regulations as to making persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs as the Court thinks just."

The 24 Vict. c. 10 (Admiralty Court Act, 1861) s. 7, enacts that the "High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." Sect. 13 enacts that "*whenever any ship or vessel, or the proceeds thereof, are under arrest of the High Court of Admiralty*, the said Court shall have the same powers as are conferred upon the High Court of Chancery in England, by the 9th part of the Merchant Shipping Act, 1854."

(1) 1 K. & J. 263; 24 L. J. (Ch.) 229.

hibition can be properly sent. Formerly a prohibition would certainly lie; *Jennings* v. *Audley* (1); *Grant* v. *Gould* (2); *Velthasen* v. *Ormsley* (3); *The Admiralty Case* (4); and recent legislation has not affected the matter, there being no express enactment taking away the old right of the common law Courts: see *Smith* v. *Brown* (5), where the Court of Queen's Bench (dissenting from *The Beta* (6)), held, that the Admiralty Court had no jurisdiction to entertain a suit instituted under 9 & 10 Vict. c. 93, for personal injuries resulting in death, occasioned by the collision of two vessels.

Sir J. B. Karslake, Q.C. (*C. W. Wood* and *Cohen* with him), for the defendants. It may be admitted that prohibition formerly lay to the Admiralty Court, but by recent statutes the Court has been made in effect a superior Court: see especially 3 & 4 Vict. c. 65, ss. 11, 13, and 19; 24 Vict. c. 10, ss. 12, 13, 14, 15, 16, 17 and 23; 31 & 32 Vict. c. 71, ss. 9 and 26; and 34 & 35 Vict. c. 91, s. 2; *Ricketts* v. *Bodenham.* (7) *Smith* v. *Brown* (5) is distinguishable, for it turned entirely upon the question whether under Lord Campbell's Act the Admiralty Court had jurisdiction. But assuming prohibition still lies, it ought not to issue in this case. The contract with the plaintiff was to carry partly by land and partly by water, and as to the part of the transitus performed by water, the defendants are entitled to the protection of the Merchant Shipping Acts of 1854 and 1862. And the Admiralty Court can finally dispose of the interests and claims of all the parties in conflict: *Place* v. *Potts* (8); *Le Conteur* v. *South Western Ry. Co.* (9); *Baxendale* v. *Great Eastern Ry. Co.* (10).

With regard to the contention that there is no jurisdiction, because neither the ship nor the proceeds thereof were under arrest before the commencement of the suit, it is unnecessary that either should then be under arrest. It is enough if the ship or her proceeds were actually or constructively under arrest, before

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(1) 2 Brown. and Gold. 30.
(2) 2 H. Bl. 69.
(3) 3 T. R. 315.
(4) 12 Co. Rep. 79.
(5) Law Rep. 6 Q. B. 729.
(6) Law Rep. 2 P. C. 447.
(7) 4 A. & E. 433.
(8) 5 H. L. C. at p. 388.
(9) Law Rep. 1 Q. B. 54. 12 Jur NS 266
(10) Law Rep. 4 Q. B. 244.

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the injunction complained of was applied for. Now the ship could not be arrested, for it was at the bottom of the sea, but that does not oust the jurisdiction of the Court: *The Northumbria.* (1) The proceeds were constructively under arrest before the application of the 22nd of November for an injunction specifically addressed to the plaintiff, for the defendants had by that time paid into court the maximum per ton prescribed by the Merchant Shipping Act, 1862, s. 54. The condition precedent to the exercise of jurisdiction indicated by 24 Vict. c. 10, s. 13, was therefore fulfilled. As to the admission of liability, that is not a condition precedent to the institution of the suit. It is doubtful if liability need be admitted at all: see Dr. Lushington in *The Amalia* (2); but at all events it can be admitted at any time before decree, and it was in this case unconditionally admitted on the 4th of August, 1870.

Manisty, Q.C., in reply, referred to *Gould* v. *Gapper* (3); *Ex parte Smyth.* (4)

Cur. adv. vult.

Jan. 27. KELLY, C.B. I am of opinion that the prohibition asked for must issue on the ground that when this application for an injunction was made, the Court of Admiralty was proceeding without jurisdiction. I entertain no doubt that we have still the power, which unquestionably was possessed formerly by the superior Courts, of prohibiting the Court of Admiralty in such a case; and the only question, therefore, is, whether, under the circumstances stated in this record, there was jurisdiction or not. Now the plaintiff insists that there was not, for two reasons—first, because at the commencement of the suit the defendants had not admitted liability; and, secondly, because at that time neither the ship *Normandy* nor her proceeds were under arrest. With regard to the first objection, the question is not whether at some time or other before any decree is pronounced liability must not be admitted, but whether its being admitted is a condition precedent to the suit being instituted. It was indeed argued that no admission of liability is necessary at all, and the high authority of Dr. Lushington (5) was cited for that proposition. But I do not think his observations really go that length. They may be explained when the facts of the case before him are considered, for it is clear that there no formal admission of liability was necessary before the institution of the suit. This seems to me to be the true effect of Dr. Lushington's remarks. If, however, he really intended to lay down generally that no admission of liability before decree is necessary, I cannot concur in his opinion. For the language of s. 514 of the Merchant Shipping Act, 1854, on which the matter turns, is clear, and prescribes the functions of the Court of Chancery with precision. The Court is not to inquire into the question of liability, but merely to determine and distribute the amount of liability; and unless such liability is placed beyond dispute in some irrevocable way before decree, no jurisdiction is conferred at all.

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(1) Law Rep. 3 A. & E. 24.

(2) Bro. & Lush. 151; 32 L. J. (P. M. & A.) 191.

(3) 5 East, 345.

(4) 2 C. M. & R. 748.

(5) *The Amalia*, Bro. & Lush. 151; 32 L. J. (P. M. & A.) 191.

This is the only section conferring any power on the Court of Chancery, and the absence of any other raises the question whether that Court would have jurisdiction to entertain, under any circumstances, a claim for damages for a personal injury, or, under Lord Campbell's Act, by the representatives of a deceased person who had died of injuries caused by the shipowner's negligence. I cannot doubt that a bill filed by the executors of the deceased person would be open to a demurrer. For the claim must be made at law under the Act, and the Court of Chancery has no authority to entertain it, nor do I think that it could entertain an original suit in respect of a personal injury. And there is no difference, in my opinion, between the Court of Admiralty and the Court of Chancery in this respect. The former has, by s. 13 of 24 Vict. c. 10, the same powers, and no other, conferred on it as the latter, and, therefore, where liability is not admitted, has no jurisdiction over a claim preferred for personal injury, or for pecuniary loss from the death of a person injured. It is true that the Court of Admiralty possesses an inherent jurisdiction over cases of damage arising by reason of ships coming into collision; a jurisdiction which is confirmed and, it may be, extended by s. 7 of 24 Vict. c. 10. Still it cannot be contended that, either originally or by that statute, there is any authority to deal with an ordinary case of personal injury arising from a collision, or with a case under Lord Campbell's Act. The decision in *Smith* v.

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Brown (1), with which I entirely agree, is conclusive on this point; and, independently of authority, the language of s. 514 of the Merchant Shipping Act, 1854, is quite at variance with the proposition that any such jurisdiction exists. I am inclined, therefore, to think that it is an objection to these proceedings that there was no admission of liability before the commencement of the suit, but I do not base my decision upon this circumstance. It may be that it is competent to the Court of Admiralty to make a rule of procedure to the effect that, after suit instituted, the plaintiff might within a reasonable time, but before decree, admit liability. It is, however, clear that there must be at some period before decree an unequivocal admission, so as to enable the Court to pronounce a judgment. The case of *Hill* v. *Audus* (2) has been referred to as shewing that the admission must be prior to the suit; but there the bill was dismissed, not because liability was not admitted, but because it was denied, and the judgment of the Vice-Chancellor does not support the plaintiff's contention. If, therefore, the plaintiff asked for a prohibition merely upon this ground, I should not feel disposed to grant it.

But now I come to the more material question, whether the jurisdiction of the Court of Admiralty is not conditional upon the ship or its proceeds being under arrest. In the case of an application to the Court of Chancery, it is enough that "several claims are made or apprehended against the shipowner" (see s. 514 of Merchant Shipping Act, 1854); but under 24 Vict. c. 10, s. 13, it is essential to the jurisdiction of the Court of Admiralty that "the ship or the proceeds thereof should be under arrest." If words are to have any force or meaning, there can be no jurisdiction under this section unless the ship or proceeds, or something clearly equivalent to the proceeds, are under arrest at the time of the institution of the suit. But in this case neither the ship nor her proceeds nor any clear equivalent were under arrest. The sum of 5000*l*. had been paid into court, but that was a sum less than the company was liable to pay, having reference to the registered tonnage of the *Normandy*. Even assuming, therefore, that the opinion of Sir R. Phillimore, expressed by him in *The Northum-*

(1) Law Rep. 6 Q. B. 729.

(2) 1 K. & J. 263; 24 L. J. (Ch.) 229.

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bria (1) is correct, that an equivalent to the proceeds will satisfy the Act of Parliament, no such equivalent existed here. The necessary sum would have been 6376*l.*, and it had not been paid into court when this suit was instituted, and the very foundation of the jurisdiction of the Court was therefore wanting. Under these circumstances the judgment of the Court must be for the plaintiff. I regret to have felt constrained to arrive at this conclusion, as the defendants appear to me to deserve the protection of the statutes; but there are insuperable difficulties in the way of their claiming it.

MARTIN, B. I am of the same opinion. The point made by Sir John Karslake, that having regard to the present constitution of the Court of Admiralty as modified by recent statutes, no prohibition lies, but that the court is now on the footing of a superior court, is in my opinion untenable. Prohibitions to the Court of Admiralty have issued for centuries from the superior courts, and I am satisfied there is nothing in the Admiralty Court Act of 1861, or in any other of the statutes referred to, to take away the power which we formerly possessed. All that has been done is to make the court a court of record, and to give it a variety of powers which the superior courts also exercise. But if it had been intended to take away the writ of prohibition, there would, in my judgment, have been an express enactment to that effect. Moreover, the case of *Smith* v. *Brown* (2) is decisive on the matter. There the Queen's Bench claimed to exercise, and did exercise, the right of issuing a prohibition, and we are bound by that authority.

Now, the facts of this case are shortly these: In March, 1870, the plaintiff took a ticket from London to Guernsey at the London station of the defendants. That was for a journey partly by land and partly by water. The plaintiff went safely to Southampton, where he embarked on the defendants' vessel *Normandy*, for the purpose of being conveyed to Guernsey. On the voyage that vessel came into collision with the *Mary*, and was sunk. Considerable injury was done both to persons and property, and amongst other damage, the plaintiff's luggage was lost. Such being the facts, I must say, for my own part, that I should have been open to hear

(1) Law Rep. 3. A. & E. 24.

(2) Law Rep. 6 Q. B. 729.

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an argument on the question whether the Court of Admiralty had any jurisdiction at all. This contract, made in London, was for a journey partly by land and partly by water; and it is said that, because the breach of that contract occurred on the sea, therefore the plaintiff is to lose the protection of the common law, and is to be confined to that of the Court of Admiralty, which awards different damages and a different mode of redress upon altogether different principles. But the plaintiff has not argued this question fully, and therefore I do not give a judicial opinion upon it.

These goods of the plaintiff, then, being lost, he commenced, on the 21st of May, 1870, an ordinary action for damages in this court against the defendants as common carriers. But on action brought, two cross suits between the owners of the *Normandy* and *Mary* were instituted, and I apprehend properly instituted, in the Court of Admiralty, so far as the actual parties were concerned, and each party charged the other with negligence. The suits went on as in ordinary cases between plaintiff and defendant, and in the result the *Normandy* was pronounced by the Court, in July, 1870, to be alone to blame. Meanwhile the proceeding occurred which is supposed to give jurisdiction to the Admiralty Court in the present case. Pending the final decision in the suits for damages, the defendants instituted a suit for limitation of their liability against the owners of the *Mary* and of her cargo, and against all and every other person or persons interested in the *Mary* and *Normandy*, or having any right, claim, or interest whatever in reference to or arising out of the collision, admitting their liability conditionally upon their being declared liable in the other suits; and in that state of things the Court, on the 4th of June, 1870, made an order that "all actions and suits pending in any other court in relation to the subject-matter of this suit, to wit, the liability of the owners of the *Normandy* in respect of loss of life or personal injury, or loss of or damage to ships, goods, merchandise, or other things on the occasion of a collision which occurred on or about the 17th of March, 1870, between the *Normandy* and the *Mary* be stopped;" and the real question in the case is, whether the Admiralty Court had any jurisdiction to make this order without any notice to the plaintiff or giving him any opportunity of being heard. I am clearly of opinion that there was no such jurisdiction.

The question depends upon the construction of the Merchant Shipping Acts of 1854 and 1862, and the Admiralty Court Act of 1861. With regard to the Acts of 1854 and 1862, they now regulate the shipowner's liability as a carrier by water. Until 1734 that liability was unrestricted, and just the same as that of a carrier by land; but in that year the shipowner's responsibility was limited to the value of the ship and freight. Subsequent statutes confirmed this limitation, but ultimately they were all repealed, and the restriction on liability is now governed by the Merchant Shipping Act, 1854, s. 504, as modified by the 54th section of the Act of 1862. The substance of these enactments is that, in respect of loss of life or personal injury, either alone or together with damage to merchandise, the shipowner's liability is not to exceed £15 a ton; and, as will presently be seen, this provision is fatal to these proceedings.

This being the state of the law as to the shipowner's liability, s. 514 of the Act of 1854 gave jurisdiction to the Court of Chancery, in the cases therein referred to, to entertain proceedings for the determination of the amount of liability and the distribution of that amount. That Court has frequently exercised this jurisdiction, but it has—as I understand the decision in *Hill* v. *Audus* (1), which is binding upon us—always insisted that the party who sought to obtain limited responsibility should admit liability to some extent as the foundation of jurisdiction. Then the powers of the Court of Chancery were conferred on the Court of Admiralty, subject to the conditions of s. 13, according to which it is essential to the exercise of jurisdiction that either the ship or her proceeds are to be under arrest. This is a condition precedent to the exercise of jurisdiction. But the learned Judge of the Admiralty Court seems to have decided that, though the *Normandy* was at the bottom of the sea, and no proceeds were under arrest, still the Court had jurisdiction, upon payment into court by the owners of the *Normandy* of the sum of money which would have represented her value had she been in existence. Whether this be so or not, I cannot say. It is sufficient to remark that in this case

(1) 1 K. & J. 263; 24 L. J. (Ch.) 229.

the 15*l.* per ton was not brought into Court until long after the institution of the suit; and there is no finding on the record that this is the real value of the ship.

I am therefore of opinion that our judgment should be for the plaintiff; and I must add that, quite apart from these statutes, I think the prohibition should go, because the plaintiff had no notice whatever given to him of any of these proceedings affecting him which were being taken in the Court of Admiralty. It is an essential principle of justice that, if a Court proposes to make an order affecting a man's rights, he is entitled to be heard against that order before it is made. That is the effect of the cases cited in Broom's Legal Maxims, 5th ed., p. 113, and upon that ground alone I should be prepared to hold these proceedings in the Admiralty Court defective. The order of the 4th of June, 1870, appears to me to be a mere nullity, and we are bound to protect the plaintiff from its consequences.

CLEASBY, B. I have little to add; but as I do not entirely agree with all that has been said, I will state very briefly the reasons which bring me to the same conclusion as the rest of the Court. This is an application for a writ of prohibition, which is defined by Blackstone (Stephen's Black., 5th ed., vol. iv. p. 10) to be a writ "directed to the judge and parties to a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a surmise either that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other Court." It is obvious that the exercise of this jurisdiction is of great importance to the subject, and is not a matter which is merely discretionary. If it were, I should, having regard to all the circumstances of this case, decline to accede to the plaintiff's application. But it is laid down—no doubt correctly—in Comyns' Digest, tit. Prohibition (C), that a prohibition ought to be granted ex debito justitiæ. If, then, it ought to go, it must go, and I must agree to its going.

The writ is asked to the Court of Admiralty, and there is no question that formerly prohibition lay to that Court. It is so laid down by Blackstone in a passage immediately following that which I have already cited. The Court of Admiralty has never had more

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than a limited jurisdiction (see Com. Dig. tit. Admiralty, F. 1, F. 2), and recent statutes have made no alteration in this respect. The jurisdiction has been enlarged, but it is still limited, and the Court, though with increased powers, and though for the purposes of the Judicial Committee Act, 1871 (34 & 35 Vict. c. 91) it is classed with the superior courts, is still a~~n~~ ~~inferior~~ court of ~~with~~ limited jurisdiction, and that being so, if it assumes jurisdiction over a subject-matter beyond its limits, any person aggrieved has a right to come to a superior court for a prohibition. I have thought it right to make these remarks because I do not think we are bound absolutely by the decision of the Queen's Bench in *Smith* v. *Brown* (1), but that we ought to be satisfied ourselves, in such a case as this, that we have the jurisdiction we are asked to exercise.

I now proceed to consider whether the Court was exceeding its jurisdiction in making the order of the 4th of June. If it was, this prohibition ought to go, for nothing occurred afterwards, so far as I can see, to interfere with the plaintiff's right to the writ. Now, I think it clear that order was unauthorized. The Court was at that time incompetent to give the plaintiff redress for the injury he had suffered, because the defendants had not then admitted their liability; and their liability was not in fact ascertained until a subsequent period. Yet the Court, though it could give the plaintiff no redress, issued a general injunction on that day against all actions arising out of the collision. This seems to me to be ground for prohibition, just in the same way as an injunction issued without jurisdiction by the Court of Chancery of Chester—a court of limited jurisdiction—is stated in Com. Dig. tit. Prohibition (A.) to have been held ground of prohibition to that Court.

But assuming that the admission of liability might be made at any time before decree, the 13th section of the Admiralty Court Act, 1861, imposes a further condition to the exercise of jurisdiction. The ship or her proceeds must be under arrest. Now, upon this part of the case I entirely agree with what has been said by the Lord Chief Baron and my Brother Martin. At that time neither the ship, nor the proceeds, nor anything equivalent to the proceeds, were under arrest; and although at a subsequent period a sum was paid into court equal to the maximum amount fixed by the Merchant

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(1) Law Rep. 6 Q. B. 729.

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Shipping Act, 1862, s. 54, still, there was no jurisdiction to institute the suit. The plaintiff has accordingly a right, in my opinion, to prevent its being entertained so far as it affects him. It was commenced when the Court had no jurisdiction, and the order of the 4th of June was made without jurisdiction also. For these reasons I concur with the rest of the Court that judgment must be for the plaintiff.

I may add that if we had a discretion as to this application, the fact that the conditions of jurisdiction had been complied with subsequently might be very material. But this writ is asked for ex debito justitiæ, and I think it very doubtful if any subsequent compliance with the conditions of jurisdiction would take away the plaintiff's right; and however this may be, I do not find upon this record any statement that the ship or her proceeds or any clear equivalent have ever been arrested.

Judgment for the plaintiff.

Attorneys for plaintiff: *Brooksbank & Galland.*

Attorneys for defendants: *Clarkson, Son, & Greenwell; and Crombie.*

Jan. 30.

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Ex parte STEWART.

Attorneys Act, 186~~2~~ (23 & 24 *Vict. c.* 127), *s.* 2—*Graduate of Scotch University—Intermediate Examination—Jurisdiction to entertain Application as to Examination.*

Persons who, without having graduated, are, under 21 & 22 Vict. c. 83, entitled to the same rights and privileges as regards the government of the Scotch universities as Masters of Arts, are not Masters of Arts, within the meaning of 23 & 24 Vict. c. 127, s. 2, so as to be entitled to admission as attorneys after a three years' service.

Semble (per Bramwell and Channell, BB.), that the only appeal against the refusal of the examiners under the Attorneys Acts to grant a certificate, is to the judges at Serjeants' Inn, and that the Court of Exchequer has no jurisdiction to entertain such an application.

THIS was an application to the Court for a rule calling on the examiners for the intermediate examination of articled clerks under 23 & 24 Vict. c. 127, s. 9, to shew cause why they should not grant to the applicant their certificate that he had duly passed that examination.

By the regulation made in pursuance of that section (January, 1863, rule iii. 1), every person serving under articles of clerkship is to be examined, "either in the term in which one-half of his term of service shall expire, or in one of the two terms next before, or one of the two terms next after one-half of his term of service," the examiners being (rule iii. 2) the examiners appointed under 6 & 7 Vict. c. 73, ss. 15, 16, and the rule of Hilary Term, 1853, relating to final examinations.

The articles under which the applicant served were dated the 3rd of January, 1870, and were executed for a term of three years. In Michaelmas Term last he presented himself at the intermediate examination, and was examined de bene esse. The examiners refused to grant him a certificate, doubting (under the circumstances stated below) their power to do so; but they intimated that he had passed a satisfactory examination.

The applicant claimed to be entitled to be admitted after a three years' service of articles, by virtue of 23 & 24 Vict. c. 127, s. 2, which provides that "any person having taken . . . . the degree of Bachelor of Arts, Master of Arts, Bachelor of Laws, or Doctor of Laws, in any of the universities of Scotland," may be admitted as an attorney on a service of three years.

The applicant had entered at the University of Edinburgh. He had not, in fact, taken his degree there, but he had attended the full course of classes and lectures required for the degree of Master of Arts, and had passed all the usual examinations except the final examination for the degree. At the time he attended the university the practice of taking the degree had to a great extent fallen into disuse; and by 21 & 22 Vict. c. 83 (An Act for the better Government of the Universities of Scotland), this fact was recognized, and by s. 6 a new governing body was constituted in each university, called the general council, which was to consist, in addition to the Professors and the Masters of Arts and Doctors of Medicine, of students who should, within three years after the passing of the Act, prove that they had gone through a certain course of study. By 31 & 32 Vict. c. 48, ss. 27, 28, the right of voting in the election of parliamentary representatives for the universities of Scotland was also conferred on such students.

The applicant had, prior to the expiration of the three years

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limited by the Act of 21 & 22 Vict. c. 83, gone through the course of study mentioned in s. 6 of that Act, and he was accordingly duly admitted and enrolled as a member of the general council; but he had not taken his degree of Bachelor of Arts or Master of Arts. He was afterwards admitted as an advocate, and practised at the Scottish Bar and in the Sheriffs' Courts of Scotland.

Jan. 27. *Thesiger*, in support of the application. Although not within the exact terms of 23 & 24 Vict. c. 127, s. 2, the applicant is within its meaning. He occupies the same position with a Master of Arts not only as to academic training, but as to participation in the government of the university.

[BRAMWELL, B. Assuming you are right, have we any jurisdiction to entertain the application? The General Rules of Hilary Term, 1853 (rule 3), give an appeal from the examiners' refusal to all the judges at Serjeants' Inn. If that is the case with the final examination, have we, as the Court of Exchequer, any power to hear an appeal from the examiners at the intermediate examination?]

Such applications have been entertained in the Court of Queen's Bench with respect to the final examination, and it would be extremely inconvenient if the applicant could not have his application considered at this stage of his course.

Garth, Q.C., on behalf of the examiners, shewed cause in the first instance. He did not oppose the application, but submitted to the judgment of the Court.

Cur adv. vult.

Jan. 30. BRAMWELL, B. I think that the application must be refused. I am not at all clear that the Court has any jurisdiction in this matter, because it is one that concerns not this Court only, but all the Courts in Westminster Hall. The appeal against the rejection of a person desiring to be finally examined is to a specially constituted tribunal at Serjeants' Inn, which acts, if I may say so, for the whole of Westminster Hall; and I feel a doubt whether it could have been intended that any one Court should indirectly have a separate jurisdiction in the matter. Again, if we were to make the order asked, I do not see how we could enforce it. The jurisdiction, if it exists, must be in all the Courts in Westminster

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Hall equally; and it is possible (though not probable) that some other Court might make a contrary order. But there is another reason for entertaining this doubt. I am by no means sure that the applicant is right in making any application until the time has arrived for passing his final examination. Mr. Thesiger says, truly, that it would be very desirable for the applicant to get an opinion upon the point meanwhile, and not to go on in a state of uncertainty till the end of his three years, and then to find that he is subject to rejection. I sympathize with that desire; but if the matter is not ripe for decision we cannot consider it. However, I am also of opinion that this application ought to be refused, on the ground that the examiners are right in the view they have taken. It is no doubt true that the applicant occupies a position in the Scotch University which is equal to that of a Bachelor or Master of Arts. It may be that but for the Act of 21 & 22 Vict. c. 83, his case would have been comprehended within the provision of 22 & 23 Vict. c. 127, s. 2, which shortened the time for serving, and which passed after the University Act. It is possible, now that attention is called to the point, if the legislature had to do it over again, they would make provision for such cases; but to my mind the words are plain; the benefit is given to one who is a Bachelor or Master of Arts of a university, and this gentleman is neither. Consequently, if we had jurisdiction, we ought to refuse the application.

Channell, B. If I could see my way clearly to apply the Act of Parliament in favour of the applicant, I should most willingly do it, but I entertain the same doubts as my Brother Bramwell. I think that this gentleman does not come within the Act, inasmuch as he does not shew himself to be either a Bachelor or a Master of Arts. He may probably be in an equal position, but he does not come within the words of the section. But, further, if any authority is given to entertain this application, it seems to me it is an authority to be exercised by the body of the judges at Serjeants' Inn. Sitting here as the Court of Exchequer, I think we have no jurisdiction. But it is clear that if, as the Court of Exchequer, we have jurisdiction, the Court of Queen's Bench has the same; and that Court may also have a larger and different power, because it has the power to issue a mandamus to compel officers to do an act which it is their duty, but which they refuse, to do; but this Court has no such power.

Pigott, B. Upon the question of jurisdiction there is no doubt some difficulty; but I should have thought we had jurisdiction to entertain the application. If we have jurisdiction as to the final examination, then it seems to me to follow that we have it also as to the intermediate one; and that inasmuch as this gentleman states in this affidavit that he intends to apply to be admitted to this Court, that would give us jurisdiction to see whether he is entitled to his examination as a preliminary step. But it is not necessary to determine that question, because I agree that the applicant does not bring himself within the clause of the Attorneys Act which gives the exemption. The position he has in the Scotch University is made equivalent to a degree, only for the purpose of being a member of the governing body. We cannot say that he is a Bachelor or a Master of Arts within the Attorneys Act.

Rule discharged.

Attorneys for applicant: *Markby & Terry.*
Attorney for examiners: *Williamson.*

END OF HILARY TERM, 1872.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

EASTER TERM, XXXV VICTORIA.

SAXBY AND ANOTHER *v.* EASTERBROOK AND OTHERS.

Patent—Infringement—Account—Appeal—Inspection.

1872
April 30.

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The plaintiffs obtained a verdict in an action for the infringement of a patent; a rule to enter the verdict for the defendants was discharged; and the defendants appealed. An order was afterwards made for an account of profits, which was not appealed against, but on the parties appearing before the master for the purpose of taking the account, the defendants refused to produce their books. The Court made absolute a rule for production and inspection of the defendants' books, and for interrogatories to the defendants, notwithstanding the pendency of the appeal.

At the trial of this action (which was brought for the infringement of a patent) before Kelly, C.B., upon a verdict being returned for the plaintiffs, application was made to the learned judge for an account, and was granted by him.

A rule was obtained on points reserved to enter the verdict for the defendants, which was afterwards discharged. On the 3rd of February, 1872, notice of appeal was given.

On the 13th of February, 1872, an order was made by Lush, J., "That the master do assess or take an account of the profits made

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by the defendants by reason of the infringements by the defendants of the letters-patent and patent rights mentioned in the declaration herein."

On the 2nd of March an injunction which had been granted on the 28th of February was suspended, with leave to apply to enforce it if there were any delay or default in the proceedings on appeal.

On the 9th of March the parties appeared before the master to take an account, but the defendants declined to produce their books, and it therefore became impossible to proceed.

Thereupon a summons was taken out by the plaintiffs for production and inspection of the defendants' books, and another summons for interrogatories to the defendants. Both summonses were referred to the Court. A rule nisi having been obtained accordingly,

Webster, *Q.C.*, and *R. E. Turner*, shewed cause. There is an appeal now pending, and the defendants expect the judgment of this Court to be reversed; if this should be so, the expense of taking these accounts will be thrown away. The injunction is suspended on this ground; and the same reason applies to the account. [They cited *Vidi* v. *Smith* (1), *Holland* v. *Fox* (2), and *Bridson* v. *M'Alpine*. (3)]

[CLEASBY, B., referred to *Smith* v. *London and South Western Ry. Co.* (4)]

Holker, *Q.C.*, *Aston*, *Q.C.*, and *Macrory*, in support of the rule. It is for the convenience of both parties that the account should be taken, notwithstanding the appeal; otherwise the plaintiff in any patent case would bring a fresh action for every infringement he could discover. Moreover, in fact, the order stands unappealed against, and the present application is merely ancillary to it. The practice in Chancery, as well as at common law, is uniformly to make such an order, and no precedent can be produced of its being suspended because of an appeal.

They were stopped.

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(1) 3 E. & B. 969; 23 L. J. (Q.B.) 342.

(2) 3 E. & B. 977, at p. 984; 23 L. J. (Q.B.) 211, 357.

(3) 8 Beav. 229.

(4) Kay, 408; 23 L. J. (Ch.) 562.

KELLY, C.B. From my own experience I can say that for at least thirty years past it has been a matter of course in the Court of Chancery that upon a decree being pronounced in favour of a patentee in a suit in which complaint is made of infringement of the patent, application is at once made and granted that an account be taken of the profits made by means of the infringement down to the time of the decree. In this case the trial was before me; and upon the verdict being pronounced, I at once, under the power given in the statute, granted an order for an account, meaning an account of profits from the time of the infringement to the time of verdict. Judgment was afterwards given in this court confirming the verdict. It appears that afterwards application was made to Lush, J., who made a formal order to the same effect, extending its operation to the date of the order, and that order is still in force, and has not been appealed against. In pursuance of that order the parties appeared before the master, whose duty it was to take the account, but he found himself stopped almost in limine by the refusal of the defendants to produce their books. Application is now made to this Court to enforce the production of these books, and to administer interrogatories. No objection has been made by the defendants to any particular interrogatory, and it is part of the present application to the Court that the interrogatories should also be administered. Under these circumstances, I am clearly of opinion that the rule should be made absolute.

MARTIN, B. I am of the same opinion. We must assume that the judgment of this Court was correct. Under the order made by Lush, J., the parties went before the master for the purpose of taking an account, and no objection seems to have been made to the master's proceeding upon it. The master asked for the materials for taking an account, but the defendants refused to produce their books, and therefore there was an absolute impossibility of carrying out the thing that was ordered to be done. Thereupon the plaintiffs come for an order to inspect the books and for administering interrogatories. What else could they do? It seems to me perfectly clear that they are entitled to what they ask.

I by no means say that it would be so in every case. The Act of Parliament does not say that we are to conform ourselves to the

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practice of the Court of Chancery; but we are to do what is right and proper in each case to protect any party who comes before us from inconvenience and loss. I have no doubt that what the Court of Chancery does is right and proper, but there is no absolute rule; it is a matter of discretion.

BRAMWELL, B. I am of the same opinion, and for the same reasons. The order for an account is in existence unimpeached; but what the defendants say is: "You may keep your order for an account, and I claim to be at liberty to prevent you from acting upon it." That cannot be. If they intended to say that there ought to be no such order they should have tried to set it aside or suspend it; but they do nothing of the sort. I have only to add one other observation. Although it is right, as a rule, to give effect to the verdict of the jury and the judgment of the Court thereupon, I can very well understand that there may be cases in which the Court will say, "We will not grant such an account: we think the matter is too doubtful, and no inconvenience will arise from our refusing it or suspending its operation." I think there would be nothing inconsistent with the equitable practice in this. The case of *Bridson* v. *M'Alpine* (1) would go to shew that if there were inconvenience in ordering the account the Court would not order it. But no application has been made here by the defendants.

CLEASBY, B. I am of the same opinion. We ought to enforce the order that has been made, unless reason is shewn for making a different order, and none has been shewn.

Rule absolute.

Attorney for plaintiffs: *Faithful.*
Attorneys for defendants: *Desborough & Son.*

(1) 8 Beav. 229.

LIMMER ASPHALTE PAVING COMPANY, LIMITED, *v.* COMMISSIONERS OF INLAND REVENUE.

1872
April 15.

Stamp Act, 1870 (33 *& 34 Vict. c.* 97)—*Conveyance on Sale—Covenant to secure periodical Payments—Double Duty.*

By an indenture between a company and a licensee, in consideration of 7500*l.*, of which 1500*l.* was then paid, and the remainder was to be paid in monthly instalments of 1000*l.*, the company granted to the licensee "the sole and exclusive right, licence, and authority to carry on with the asphalte of or to be supplied by the company, but not with any other asphalte, the business of asphalte paving, and of therein and otherwise using, vending, and dealing in asphalte, and of an asphalte company or asphalte business generally, within the counties of Lancaster and Chester," during the continuance of the company's concessions. The company covenanted to supply the licensee with asphalte, but were not to be bound to prevent the use or sale of asphalte within the said counties by any other person, excepting only the use or sale of such asphalte as was agreed to be supplied under the contract, either by the company or by persons purchasing from the company; and the licensee agreed not during the continuance of the licence to use, sell, or deal within the said counties in any other asphalte than that to be supplied by the company.

The licensee covenanted to pay the remaining 6000*l.* by six monthly instalments of 1000*l.*, and if he should assign the licence, to pay the whole of the remaining instalments on the expiration of two months from the date of the assignment:—

Held, 1st, that the deed was not chargeable as a conveyance on sale, no property being in fact conveyed by it; 2nd, that if it had been so chargeable, one duty only could have been charged in respect of the 7500*l.*, and not a second duty in respect of the covenant to pay by instalments the 6000*l.* remaining unpaid; 3rd, that such a payment by instalments is a periodical payment within the meaning of the Stamp Act, 1870, s. 72.

CASE stated by the Commissioners of Inland Revenue, under the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 19.

By an indenture of the 4th of November, 1871, made between the Limmer Asphalte Paving Company, Limited, of the first part, Henry George Ashurst and others, directors of the company, of the second part; and William Isaac Hetherington of the third part,

1. In consideration of 7500*l.*, of which 1500*l.* was then paid, and the balance of 6000*l.* was to be paid by instalments as thereinafter provided, and in consideration of the covenants thereinafter contained, the company granted to Hetherington, his executors, administrators and assigns, the sole and exclusive right, licence, and

authority to carry on with the asphalte of or to be supplied by the company, but not with any other asphalte, the business of asphalte paving, and of therein and otherwise using, vending, and dealing in asphalte, and of an asphalte company or asphalte business generally, within the counties of Lancaster and Chester, and not elsewhere, subject to the conditions of this contract, for the remainder then unexpired of the respective periods for which the concessions or rights then held by the company were respectively expressed to be granted or should remain in force.

2. The company covenanted with Hetherington that if they should before the expiration of their concessions obtain any extension of them, or obtain any other estate or working or other rights over or in the mines included in their present concession, they would without further payment grant him a corresponding extension of the licence and contract thereby granted, on the same terms and conditions as were therein expressed; and that if during the continuance of the licence and contract the prices payable by them for the asphalte they should supply should be less than the present prices, they would allow to Hetherington an equivalent reduction.

3. The company also covenanted with Hetherington that (he observing and performing the covenants and conditions on his part contained in the contract) they would supply to him such quantities of the company's asphalte as he should apply for, subject to the following conditions. [These conditions (1 and 2) regulated the quantity and (3) the quality of asphalte which Hetherington was to be at liberty to require; (4) provided for the contingency of the port of shipment being closed; (5) fixed the price at which the asphalte was to be delivered at Liverpool; and (6) provided for the assignment of the licence.]

4. Hetherington covenanted with the company, and separately with the directors, that he would pay to the company the balance of 6000*l.* by six equal instalments, to be paid respectively on the 4th day of each of the six months next ensuing the date of the contract, with interest at 10*l.* per cent. on any payment in which default should be made; provided that if at any time before payment of the whole he should assign the licence, the whole of the then remaining instalments, with interest (if any), should on the

expiration of two months after such assignment become immediately payable.

The company also stipulated that they should not be bound to prevent the use or sale of asphalte within the counties of Lancaster and Chester by any other person, excepting only the use, sale or dealing of or with such asphalte as was agreed to be supplied under the contract, either by the company themselves or by persons purchasing from the company.

And Hetherington agreed that he would not during the continuance of the licence use, sell, or deal in, within the counties of Lancaster and Chester, any asphalte except such as should be supplied under the contract.

The commissioners (whose opinion was required under s. 18 of the Stamp Act, 1870) expressed their opinion that this indenture was chargeable, as a conveyance on sale, with an ad valorem duty of 37*l.* 10*s.* in respect of the sum of 7500*l.* (Stamp Act, 1870, sched. tit. Conveyance on Sale of any Property), and also, as a covenant for securing the payment of money, with the ad valorem duty of 7*l.* 10*s.* in respect of the sum of 6000*l.* (Stamp Act, 1870, sched. tit. Covenant in relation to any annuity or to other periodical payments, and s. 75), and assessed the duty thereon accordingly; and the company appealed against this decision.

Jan. 29. *Brown, Q.C.* (*Haddan* with him), for the appellants. First, this indenture is not a conveyance of any property. Nothing passes by it, it is a mere contract by the company to supply Hetherington with material not yet manufactured for the purpose of carrying on a business not yet in existence. The case, therefore, is not within the decision in *Potter* v. *Inland Revenue Commissioners* (1), that an assignment of goodwill is a conveyance of property. Secondly, if the commissioners were right on this point, no second duty would be payable. This would be so if the matter rested on the authority of cases before the Stamp Act, 1870: Tilsley on Stamps, 2nd ed., p. 289; but s. 72, subs. 4, of that Act (2), enacts

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(1) 10 Ex. 147; 23 L. J. (Ex.) 345.

(2) Stamp Act, 1870, s. 72, subs. 4: "Provided that no conveyance on sale chargeable with ad valorem duty in respect of any periodical payments, and containing also provision for securing such periodical payments, is to be charged with any duty whatsoever in respect of such provision."

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expressly that no second duty shall under these circumstances be payable.

Jessel, S.G. (*Hutton* with him), for the Commissioners of Inland Revenue. The term "conveyance of property" includes any grant of an interest, whether the thing is already in existence, or is afterwards to come into existence for the first time. A deed which newly creates a right, as a grant of letters patent, or a grant of a right to enter and take minerals, is a conveyance of property. Here in fact the material exists, it is to be obtained from the company's mines, and is to be supplied to the licensee, and to him only, in the counties of Lancaster and Chester. The deed thus creates a monopoly in the traffic of the company's asphalte, which is as much property as a goodwill or the use of a trade mark: *Leather Cloth Company* v. *American Leather Cloth Company* (1). It is settled by *Caldwell* v. *Dawson* (2), and *Potter* v. *Inland Revenue Commissioners* (3), which overruled the earlier cases, that anything which is practically capable of assignment, whether assignable at law or not, is property. The licence and the benefit of this deed are not only assignable in their nature, but provision is actually made by the parties for their assignment. The language used by the parties is conclusive against them. If this is not an "actual grant or conveyance," it is at least the sale of a right not before in existence within s. 75, and the instrument is to be charged with the same duty as if it were an actual conveyance. Secondly, the payment of the 6000*l*. by instalments is not a periodical payment, but only a deferred payment.

Brown, Q.C., in reply.

Cur. adv. vult.

April 15. The judgment of the Court (Kelly, C.B., and Channell and Martin, BB.), was delivered by

Martin, B. [After stating the facts, the learned judge proceeded:—] In order to determine whether any, and if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself

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(1) 11 H. L. C. 523, at p. 533; 35 L. J. (Ch.) 53.

(2) 5 Ex. 1.

(3) 10 Ex. 147; 23 L. J. (Ex.) 345. 18 Jur 778

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by the parties is immaterial, even although they may have believed that its effect and operation was to create a security mentioned in the Stamp Act, and they so declare. For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note thereinafter written, yet if in truth the contract set forth was not a promissory note but an agreement of another character, the stamp duty would be not that of a promissory note but of the agreement. The question, therefore, stamp or no stamp, and if a stamp to what amount, is to be determined upon the real and true character and meaning of the writing. It is sufficient to refer to the case of *Rex.* v. *Inhabitants of Ridgwell* (1), to establish this proposition. The argument, therefore, of the learned Solicitor General, founded upon a supposed estoppel, is without foundation; the true character of the instrument is the matter to be ascertained.

As to the opinion of the commissioners that the instrument was chargeable as a conveyance on sale, we are of opinion that they were in error. The conveyance on sale in respect of which ad valorem duty is payable by the Stamp Act, 1870 (33 & 34 Vict. c. 97), is a conveyance on "sale of property," and in our opinion there is no property created or conveyed by this instrument. The definition of property applicable to this subject seems to be well stated by the late Chief Baron in his judgment in *Potter* v. *Commissioners of Inland Revenue* (2), in which case "goodwill of a trade" was held to be property, viz., "property is that which belongs to a person exclusive of others, and which can be the subject of bargain and sale to another." As already said, the question whether the subject of conveyance be property, is to be collected from the words of the instrument itself. We collect from it that the company had an asphalte mine in a part of Prussia of which Bremen is the shipping port; that they contracted to sell to a Mr. Hetherington, being the third party to the instrument, a quantity of asphalte not exceeding 6000 tons in any one year; and that the asphalte was to be shipped at Bremen and delivered free at Liverpool, at the price of 3*l.* 15*s.* per ton. According to the instrument, upon the delivery and payment for the asphalte it became Mr.

(1) 6 B. & C. 665.

(2) 10 Ex. at p. 156; 23 L. J. (Ex.) at p. 347.

Hetherington's property, to use it, or if he thought fit, to destroy it. It became absolutely his property. But the instrument further stated that the company thereby granted to the licensee "the sole and exclusive right, licence, and authority to carry on with the asphalte to be supplied by them, the business of asphalte paving, and of therein and otherwise using, vending, and dealing in asphalte, &c., within the counties of Lancaster and Chester, and not elsewhere;" for which Mr. Hetherington was to pay them the sum of 7500*l.*, 1500*l.* upon the execution of the indenture and the remainder, viz., 6000*l.*, by six equal instalments of 1000*l.* each, to be paid respectively on the fourth day of each of the six calendar months next ensuing the date of the instrument; the first instalment to be paid on the 1st day of December then next. The ad valorem duty of 37*l.* 10*s.* charged by the commissioners is in respect of this sum of 7500*l.* We are of opinion that this duty is not payable, because in our judgment there is no creation, or conveyance, or transfer of property. In the first place the company had no exclusive right of using their asphalte within the counties of Lancaster and Chester; by the law of England such a right could not exist except by Act of Parliament. The law recognizes no such right, the Crown has not the power to create it, and it is nothing more than an assumption and pretence to exercise a power which has no legal existence; and if the company had no such property and could not create it, they could not convey or transfer it. It is, therefore, in our judgment, no conveyance or transfer of property at all. See *Keppell* v. *Bailey* (1); *Ackroyd* v. *Smith.* (2) The effect of the instrument is probably a covenant by the company that no asphalte shipped by them to England should be used in Lancashire or Cheshire except by Mr. Hetherington, and for a breach of this covenant Mr. Hetherington might possibly maintain an action; and it may also amount to a covenant on the part of Mr. Hetherington that he will not use the asphalte except in the two named counties.

As to the opinion of the commissioners that, in addition to this ad valorem duty, the instrument was liable to further ad valorem duty of 7*l.* 10*s.* in respect of the balance of 6000*l.*, we are clearly of opinion that it is erroneous. In determining this second question, it is to be assumed that the ad valorem duty of 7*l.* 10*s.* is chargeable upon the 7500*l.* There is no better established rule as regards stamp duty than that all that is required is, that the instrument should be stamped for its leading and principal object, and that this stamp covers everything accessory to this object. The covenant to pay the 6000*l.*, the balance of the purchase-money, is a direct accessory to the main object of the instrument, viz., the sale of what is for the present question assumed to be property, and the payment of the purchase-money. The cases upon this subject are collected in Tilsley on the Stamp Laws, 2nd ed., p. 319. We should have arrived at this conclusion without recourse to the 72nd section of the Stamp Act, 1870, but, as it seems to us, the fourth enactment there is direct upon the point. It was contended that the payments were not periodical, but surely a periodical payment means money paid at periods; and such are six successive payments of 1000*l.* each at intervals of six months.

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(1) 2 My. & K. 517.

(2) 10 C. B. 161.

The 75th section was also referred to; it seems to us to have no application. If this supposed right be created at all, it is created by actual grant or conveyance and not by any collateral instrument.

The stamp duty to which, in our opinion, the instrument is subject, is a deed stamp of 10*s.* and an ad valorem duty of 2*s.* 6*d.* per cent. upon 6000*l.*

Judgment that the deed should bear a deed stamp of 10s., and an ad valorem duty of 2s. 6d. per cent. on the 6000l. secured by covenant.

Attorneys for appellants: *Young, Maples, & Co.*
Attorney for commissioners: *Solicitor of Inland Revenue.*

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HOLME, EXECUTOR *v.* HAMMOND AND OTHERS.

Partnership—Sharing Profits—Liability as Partners of Executors of a Deceased Partner—Partnership Act, 1865 (28 & 29 *Vict. c.* 86.)

4 PCd 427
Ch D. 471
CL D 306

By articles of partnership T. F., W. F., and S. agreed to carry on the business of auctioneers in partnership for seven years; they were to contribute capital and to share profit and loss equally; and if either died during the partnership term, the surviving members of the firm were to continue the business, and were to pay to the personal representatives of the deceased partner the share of the profits to which he would have been entitled if living.

T. F. died during the partnership term. At the time of his death the firm had no capital, except office furniture and fittings, worth about 100*l*. They had in their hands a sum of between 400*l*. and 500*l*., which was the proceeds of debts due to a former firm in which T. F. was a member, and left in the hands of the new firm for collection; and this sum belonged beneficially to T. F.; T. F. was also entitled in respect of his share of profits, beyond the amounts which he had drawn, to a sum of about 200*l*.

After the death of T. F., the surviving members of the firm continued to carry on the business, to collect the debts due to the old firm, and to earn profits. The executors of T. F. never interfered in the business, but they claimed, under the articles of partnership, the share of profits to which T. F. would have been entitled if living. No settlement of accounts in respect of T. F.'s interest in the partnership business was made between his executors and the surviving partners. Sums of money amounting in the whole to about 625*l*. were from time to time paid by the firm to the executors; these payments were made generally, and not on any particular account.

After the death of T. F., the firm were employed by the plaintiff to sell property; they sold the property and received the proceeds, but did not pay over the same to the plaintiff. In an action brought (after the death of S.) against the executors of T. F. and W. F.:—

Held, that the executors of T. F. were not liable as partners.

The Partnership Act, 1865 (28 & 29 Vict. c. 86), considered.

ACTION for money had and received, brought by James Holme (the acting executor of the will of William Holme, deceased), to recover from Robert Hammond, Richard Gaskell, and William Henry Fisher, the sum of 1841*l*., the residue (after deducting commission and expenses) of the sum for which the firm of T. M. Fisher & Co. had sold certain property of the testator, upon the instructions of the plaintiff.

William Henry Fisher had allowed judgment to go by default; and the circumstances under which the plaintiff sought to make the defendants Hammond and Gaskell liable as partners were as follows:—

A firm of T. M. Fisher & Son had formerly carried on the business of auctioneers in Manchester.

On the death of T. M. Fisher, his son and surviving partner, Thomas Fisher, continued the business in partnership with his brother William Henry Fisher under the name of T. M. Fisher & Sons.

In the year 1868, Thomas Fisher's health failing, a new partner was taken in, and by articles of partnership, dated the 17th of July in that year, Thomas Fisher (the testator), William Henry Fisher, and George Henry Smith entered into partnership as auctioneers for a period of seven years, under the name of T. M. Fisher, Sons, & Smith. By these articles the capital was to be contributed in equal shares, on which interest was to be paid at 5*l.* per cent. before the division of profits; the net profits were to be divided equally; and all outgoings, interest on capital, and losses were to be paid out of the profits, or, in case of deficiency, to be borne by the partners in equal shares.

On the 25th of December and the 24th of June in every year an account was to be made up of all the receipts, payments, engagements, and transactions of the partnership during the previous half year, and of all the capital, property, engagements, and liabilities for the time being of the partnership, and was within six months to be audited by a public accountant.

On the determination, by effluxion of time or otherwise, of the partnership, an account was to be taken of all the stock in trade, debts, and effects belonging or due to the partnership, and of all the debts and engagements due or to be performed by the partnership; and after payment of all debts, including the capital of each partner, the residue of the assets was to be divided equally between the partners or their personal representatives.

It was also provided that "in case any one of the said partners should die during the partnership term, then the surviving partners shall continue the said partnership upon the terms of these presents until the end of the said partnership term, and shall pay unto the representatives of such deceased partner for the residue of the said term, the share of the profits of the partnership business which such deceased partner would have been entitled to if living; but in case of the death of two of the said partners during the said partnership term, then the surviving partner shall continue the business for the residue of the said term, and shall pay unto the representatives of each deceased partner for the residue of the said term, one-sixth part of the share of the profits of the said business; the payment of profits to be on every 24th day of August and 24th day of February."

On the 20th of August, 1869, Thomas Fisher died, having by his will appointed the defendants Hammond and Gaskell his executors and trustees.

The business was continued by the surviving partners under the same name until the death of George Henry Smith, on the 26th of November, 1870, after which it was continued by the sole surviving partner, William Henry Fisher.

At the time of the testator's death it did not appear that there was in fact any capital belonging to the firm except some office furniture and fittings of the value of about 100*l.* (1)

There was then due to the testator in respect of his share of profits up to June, 1869, beyond the amount which he had drawn, the sum of 106*l.*; and between June and his death in August further profits had been earned, of which his share would be 90*l.*

The collection of various debts due to the old firms of T. M. Fisher & Son and T. M. Fisher & Sons had been left in the hands of the new firm constituted in 1868. At the time of the testator's death the firm had in their hands the sum of 440*l.*, the proceeds of debts then collected by them, and this sum belonged to the testator, and constituted a debt to him from the firm. After his death these debts were further collected by the surviving partners to an

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(1) Certain balance sheets made out by the surviving members of the firm were put in evidence at the trial, which shewed a sum of over 2000*l.* credited to the testator as capital; but this sum appeared to consist of debts due to the old firms, which were left in the hands of the new firm for collection, as stated below.

amount considerably exceeding 1000*l.* (1), but what proportion of this sum belonged to the executors in respect of the testator's interest in the firms of T. M. Fisher & Son and T. M. Fisher & Sons did not distinctly appear.

The defendants claimed under the partnership articles the share of profits which the testator would have been entitled to if living; they from time to time required of the surviving partners an account of profits; and in balance-sheets prepared in June, 1870, and November, 1870, they were credited with such profits.

On the 22nd of February, 1871, they filed a bill against William Henry Fisher, and the executrix of George Henry Smith, for winding up the partnership affairs; but the suit was not prosecuted, and the allegations in the bill threw no light on the question of whether they were liable as partners.

Sums of money, amounting to about 625*l.*, were from time to time paid by the surviving partners to the defendants; but these payments were not made on any particular account.

The defendants had not in any way interfered with the conduct of the business.

In April, 1870, the plaintiff's testator employed the firm of T. M. Fisher, Sons, & Smith, to sell a mill and machinery. The sale was effected, and the purchase-money received by that firm; and, after deducting commission and expenses, there remained due to the plaintiff, as executor, the sum of 1841*l.*, to recover which the present action was brought.

The cause was tried before Kelly, C.B., at the Liverpool Summer Assizes, 1871, and upon the foregoing facts being proved a verdict was entered for the plaintiff for the amount claimed, with leave to the defendants to move to enter a nonsuit or a verdict for them.

A rule having been obtained accordingly,

Pope, Q.C., and *Heywood*, shewed cause. (2) It must be admitted

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(1) It was given in evidence at the trial that the total amount of the debts remaining uncollected at the commencement of the new partnership in 1868 was 4155*l.*, in June, 1870, 3538*l.*, and in November, 1870, 2268*l.*

(2) The rule was argued in Hilary Term by *Pope, Q.C.*, and *Heywood*, for the plaintiff, and by *Holker, Q.C.*, for the defendants; but the arguments not being then concluded, it was re-argued in Easter Term by *Heywood*, for the plaintiff, and *Townsend* and *Hopwood*, for the defendants.

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that the defendants took no part, nor had the right to take any, in the active conduct of the business, but they are in the position of dormant partners of the firm. Both at law and in equity a partnership is dissolved by the death of a partner, and his representatives are not partners with the surviving members of the firm: Williams on Executors, 6th ed. p. 1609; Lindley on Partnership, 2nd ed. vol. i. p. 492; Dicey on Parties to Actions, p. 316; it is their duty to realize and invest their testator's estate: *Kirkman* v. *Booth.* (1) But if they continue his capital in the business they constitute themselves co-partners with the surviving members of the firm. And this is equally so, although they do it in pursuance of the testator's express directions (which they are not bound to comply with), and without any breach of trust; *Ex parte Garland.* (2) Whether they do it lawfully or unlawfully with regard to those beneficially interested in the testator's estate, their position as to third persons is the same; they are partners in fact, and are therefore personally liable to the partnership debts; that they do not derive any personal benefit from the partnership makes no difference: *Wightman* v. *Townroe* (3); *Labouchere* v. *Tupper.* (4) It is not possible for them to escape their liability by denying their intention to be partners; for partnership turns not upon intention, but on legal inference from conduct. So in the case of shareholders in companies, agreement is as much the basis of membership as in the case of an ordinary partnership: *Gunn's Case* (5); *Reese River Silver Mining Co.* v. *Smith* (6); but the doing of an act which implies the possession of shares, such as accepting the position of director, will make a person liable as if the requisite number of shares had been actually applied for and allotted: *Leeke's Case* (7); *Harward's Case* (8); *Sidney's Case.* (9) The position, therefore, which the defendants occupy with respect to liability for the partnership debts depends upon the acts which they have done independently of their intention of constituting or not constituting

(1) 11 Bea. 273; 18 L. J. (Ch.) 25.
(2) 10 Ves. 110.
(3) 1 M. & S. 412.
(4) 11 Moo. P. C. 198.
(5) Law Rep. 3 Ch. 40.
(6) Law Rep. 4 H. L. 64.
(7) Law Rep. 6 Ch. 469.
(8) Law Rep. 13 Eq. 30.
(9) Law Rep. 13 Eq. 228.

themselves partners. What they, in fact, did, was to leave their testator's assets in the business. His assets, so far as concerned the partnership, were the goodwill and the place of business, and the sums of money shewn in the balance-sheets as his capital. (1) These were not converted or withdrawn by them, but voluntarily left in the business as an investment, and the surviving members of the old partnership acted as agents for the new partnership so created. But, further, they constituted themselves partners by claiming and receiving a share in the profits of the business. The share was only fixed in its proportion, and was indefinite in amount; and this circumstance distinguishes the case from those by which the doctrine formerly supposed to be established in *Waugh* v. *Carver* (2) has been overruled. In *Cox* v. *Hickman* (3) the creditor of the insolvents, who was held not to be liable on a bill of exchange accepted by the trustees under the deed of arrangement, could only receive profits up to the amount of his debt and interest. In *Redpath* v. *Wigg* (4) and *Easterbrook* v. *Barker* (5) the position of the defendants, so far as regarded participation in profits, was similar; they were only to take profits up to the amount of the debts. In *Bullen* v. *Sharp* (6), also, the amount to be received was limited. It must be admitted, however, that some of the dicta in the last-cited case go further; but it is submitted that so far as they lay down that sharing in profits to an unlimited amount does not constitute the recipient a partner, they were not necessary to the decision of the case, and cannot be supported. The plaintiff's contention is confirmed by the Partnership Act, 1865 (28 & 29 Vict. c. 86). That Act was intended to remedy a mischief, and may therefore be taken as evidence, or as a legislative declaration, that the mischief existed which it purported to remedy. But if the law had been already established in the sense supposed by *Cox* v. *Hickman* (3) the Act would have been unnecessary; it is therefore either evidence that *Cox* v. *Hickman* (3) did not decide what it is supposed to have decided, or is a statutory limitation of that doctrine.

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(1) See ante, p. 220, n.

(2) 2 H. Bl. 235.

(3) 8 H. L. C. 268; 30 L. J. (C.P.) 125. 7 Jur N.S. 165.

(4) Law Rep. 1 Ex. 335. 12 Jur N S 985

(5) Law Rep. 6 C. P. 1.

(6) Law Rep. 1 C. P. 86.

That the defendants come within none of the provisions of the Act is plain.

Holker, Q.C., *Townsend*, and *Hopwood*, in support of the rule. It is clear that the defendants are not partners unless they have done some acts to make them so. They have never interfered with the conduct of the business, nor have they recognized themselves nor been recognized as partners; the only acts, therefore, which can be relied on as making them partners, are the alleged leaving of their testator's capital in the business and the receipt of profits. But as to the first, it is plain that the firm had no trading capital, except the £100 worth of office furniture; the outstanding debts of the old firms, which they were agents to collect, were not capital, but merely constituted the firm debtors of the defendants to the extent to which they were actually collected; that the defendants could not obtain payment of the sum due can be no reason for making them partners. As to goodwill, under the terms of the partnership articles the defendants could be entitled to nothing for it. Next, as to the receipt of profits, it cannot be shewn that they ever received any in fact; for the sums paid them by the firm were paid generally, and were less than the sum they were entitled to in respect of the collected debts. But there is no doubt they claimed, and do claim, as they are bound to do, the share of profits to which they are entitled under the articles of partnership, not as partners, but as representatives of a deceased partner. It is clear, however, from the cases of *Cox* v. *Hickman* (1), *Bullen* v. *Sharp* (2), *Redpath* v. *Wigg* (3), and *Easterbrook* v. *Barker* (4), *Re English and Irish Church and University Assurance Society* (5), that neither this claim of profits, nor the receipt of them, if they were received, could of itself make the defendants partners. The distinction between a share in profits to a limited and to an unlimited amount, is inconsistent within the principle on which those cases (especially the two former) were decided: Lindley on Partnership (2nd ed.), vol. i., pp. 46, 47. That principle is, that to make a person liable as partner, he must have constituted his supposed partners his agents in the transaction out of which the debt arose. If he has expressly made himself partner with them, or if from the transaction in general this can be inferred, he is liable as principal. But it cannot be inferred from the receipt of a share in the profits; and by the same reasoning it cannot even be inferred from his lending them capital in respect of which he derives a share of the profits. The proposition that a person may by his acts become liable as partner, without intending to be a partner, is true; but it is applicable, as in other cases of agency, only when he holds himself out as principal by acts from which that relation will naturally be inferred. But the acts by which it is sought to make the defendants liable were not such; they were wholly unknown to the plaintiff, who, indeed, knew nothing of the relation of the defendants to the firm, and never supposed himself to be dealing with them.

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(1) 8 H. L. C. 268; 30 L. J. (C.P.) 125. 7 Jur NS. 105

(2) Law Rep. 1 C. P. 86.

(3) Law Rep. 1 Ex. 335. 12 Jur NS 9

(4) Law Rep. 6 C. P. 1.

(5) 1 H. & M. 85.

Cur. adv. vult.

April 25. KELLY, C.B. Thomas and William Henry Fisher and George Henry Smith carried on business in co-partnership as auctioneers, under a deed which provided that, in case of the death of Thomas Fisher, the other two partners should carry on the business, or what was called the co-partnership, and should pay to the executors of Thomas Fisher the share of the profits to which he would have been entitled if he had survived. Thomas Fisher died in August, 1869; the two survivors carried on the business until the death ot Smith, when William Henry Fisher continued to carry it on alone. W. H. Fisher and Smith having sold a mill and machinery in May, 1870, on account of the plaintiff, and having received the proceeds of the sale in the following month of July, the plaintiff brought this action against W. H. Fisher and the defendants to recover that sum as money had and received, insisting that the defendants, who are the executors of Thomas Fisher, and who have claimed to be entitled to the share of the profits which the testator would have been entitled to if he had lived (and in respect of which they have received certain sums together with other moneys due to the estate of Thomas Fisher, not specifically as profits, but generally on account), became partners with W. H. Fisher and Smith upon or after the death of Thomas Fisher, and as such are liable to the demand in this action.

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The single question in this case is, whether the defendants at the time when this money was received were the partners of W. H. Fisher and Smith; and this depends upon whether they have expressly or impliedly entered into a contract of co-partnership, since the death of Thomas Fisher, with W. H. Fisher and Smith, who survived him. It is contended that having claimed and actually received a portion of the profits of the business as supposed to have been ascertained upon an account taken from the 30th of June, 1869, to the 30th of June, 1870, the defendants have made themselves, or must be taken to have become, partners, and as such liable to this action.

Upon a careful consideration of the authorities bearing on this question, it certainly appears to have been thought in former times, and there are judicial dicta to that effect, that the mere perception of a share in the profits of a commercial co-partnership made the participator a partner and liable to the debts and losses of the firm. But looking to the decisions themselves in which the question has arisen, it will be seen that in no one case has the party sought to be charged been held liable except where a contract of co-partnership has been found to have been entered into. In *Grace* v. *Smith* (1), in which the language of De Grey, C.J., and Blackstone, J., appears to support the argument for the liability as partners of all who participate in the profits of a commercial concern, the decision was that there was no sufficient evidence of a contract of co-partnership, and so no liability as partners. And in the leading case of *Waugh* v. *Carver* (2), where the defendant was held liable as partner, it was because the contract proved was decided, and rightly decided, to be a contract establishing a commercial co-partnership, and the agreement in the articles that neither should be liable for the acts or the losses of the others, but each for his own (though valid and binding inter se), was of no effect against the creditors of the co-partnership firm. So in *Cox* v. *Hickman* (3), *Bullen* v. *Sharp* (4), and the Irish case of *Shaw* v. *Galt* (5), the parties sought to be charged were held not liable, on the ground that the acts done and the contracts entered into in those cases did

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(1) 2 W. Bl. 998.

(2) 2 H. Bl. 235.

(3) 8 H. L. C. 268; 30 L. J. (C.P.) 125. 7 Jur. N.S. 105.

(4) Law Rep. 1 C. P. 86.

(5) 16 Ir. C. L. Rep. 357.

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not amount to contracts of co-partnership, so that the parties had not become partners. It is unnecessary to consider the various terms and provisions of the contracts which were brought into question in those and other cases. It is enough to say, that whenever the plaintiff has failed to establish a contract of co-partnership the action has failed and the decision has been that the defendant was not liable.

In some of those cases the law of principal and agent has been referred to as governing the matter in question, but this branch of the law has really no bearing upon the case of partnership, except, indeed, that whenever a contract of partnership among commercial men exists each partner is in point of law the agent for the others and for the firm collectively, and they are bound by any contract he may enter into within the scope of the partnership with reference to the nature of the undertaking, this agency being an incident to the contract of co-partnership.

It has also been argued that the statute 28 & 29 Vict. c. 86, enacting that widows, lenders of money, and some other classes of persons, shall not by taking a share in the profits of a co-partnership be deemed partners, would be useless if these and other classes of persons might at common law become sharers in profits without incurring such liability. But it seems to me that the effect of the statute is merely that, as respects the protected classes, the sharing in profits shall be no evidence at all of a contract of partnership, whereas, with regard to others, it is evidence, though insufficient of itself to establish the liability.

We have, therefore, now to look to the facts of the present case to determine whether upon the evidence the defendants have become parties to a contract of partnership. Upon the death of Thomas Fisher the partnership before subsisting was dissolved by operation of law; W. H. Fisher and Smith from that time carried on the business; but this was, in contemplation of law, a new partnership. The defendants could not become partners with them but by some agreement, express or implied, to which they were parties. At the trial, taking into consideration the claims of the defendants to a share in the profits, the acquiescence in that claim by the two survivors, and the actual payment and acceptance of the proportion of the profits supposed to have been ascertained, together with the accounts made out of the transactions of the firm, which were alleged, and which indeed did seem, to shew that the defendants, instead of calling for an account of the state of the partnership at the death of their testator, and withdrawing from the concern whatever money or stock or property belonged to his estate, had left a portion of his capital and his share in the partnership stock and property in the business, I was, with all the circumstances before me and the accounts unexplained, inclined to think that, upon the whole evidence, a contract by the defendants to succeed their testator and to become partners in his stead might be inferred. But now that it appears that there was no capital at all, either of the testator's or the other partners, employed in the business; that the stock and co-partnership property consisted merely of a small quantity of furniture and fittings in the office of the value of 100*l.*; that the defendants neither left in nor drew out any money of the testator's, except that they drew out several successive sums of 100*l.* upon the general account of what might turn out to be due to the estate; and that, consequently, the whole case for the plaintiff was reduced to the single fact that, in pursuance of the clause in the articles of partnership, the parties considered that in paying and receiving those sums they were to be taken as well on account of the share of the profits as of other moneys due to the testator; I am of opinion that there is no evidence whatever to establish a contract of co-partnership on the part of the defendants, and, consequently, that the action is not maintainable.

MARTIN, B. [After stating the facts of the case, and the contents of the articles of partnership, and in particular the clause entitling the representatives of a deceased partner to a share of profits, the learned judge proceeded:—] After the death of Thomas Fisher, the defendants claimed and received from the surviving partners the share of the profits coming to them under the above clause. This claim was covered by the period in which the sale of the plaintiff's property was made and the purchase-money received, and in the following year they filed a bill in Chancery against the surviving partners for an account under the clause. Until nearly the end of the argument, I was under the impression that Thomas Fisher had left capital in the concern, and that the

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defendants had suffered this capital to remain, but it appears that this was not so, and that the testator, Thomas Fisher, had drawn out all his capital, and that the defendants did nothing more than claim and receive profits under the above clause. In my opinion this act did not make them liable to the plaintiff's demand. They did nothing on their own behalf at all; they merely did that which a Court of equity would have compelled them to do as executors under the will, and in my opinion it would be contrary to reason to hold them liable by that act to a responsibility which must of necessity be borne by them in their own personal capacity, and paid out of their private funds: *Wightman* v. *Townroe.* (1) It seems admitted by the learned counsel for the plaintiff that the defendants could not have interfered in or meddled with the sale; so also the money, the proceeds of it, was not their property, and if they had taken possession of it against the will of the surviving partners in order to pay it to the plaintiff they would have been trespassers; and it is difficult to understand how the defendants can, in contemplation of law, have received money of which they had neither property nor possession, and their taking which against the will of the surviving partners would have been a wrongful act.

As I have said, up to a certain time in the argument I was in favour of the plaintiff. I understood that part of Thomas Fisher's capital remained, by the permission of the defendants, in the firm, and that they took a share in the profits in part earned by it. Under such circumstances I thought it not unreasonable that they should be liable upon a valuable contract by means of which the profits were in part earned, and that the principle of *Waugh* v. *Carver* (2) applied; but, upon consideration, I doubt whether this was correct. The principle, or supposed principle, of *Waugh* v. *Carver* (2) has been much broken in upon. The case of *Cox* v. *Hickman*, in the House of Lords (3), is a very important one. It was an action upon a bill of exchange, and in substance was this: A trader had been embarrassed, and executed a trust deed; certain trustees were to carry on the business, and out of the profits pay the expenses, and divide the net residue equally amongst the creditors; the trustees accepted a bill which was dishonoured, and one of the creditors

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(1) 1 M. & S. 412. (2) 2 H. Bl. 235.

(3) 8 H. L. C. 268; 30 L. J. (C.P.) 125. 7 Jur NS 105.

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was sued upon it. The Court of Common Pleas was of opinion that he was liable. In the Court of Exchequer Chamber the judges were equally divided. The question went to the House of Lords, and the judgment of the Court of Common Pleas was reversed. Lord Wensleydale and Lord Cranworth took part in the judgment, and it seems to me that the principle on which their opinions proceeded is correctly stated by O'Brien, J., in the case of *Shaw* v. *Galt.* (1) He there expresses himself as follows: "The principle to be collected from them appears to be, that a partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business; but that the existence of such partnership implies also the existence of such a relation between those persons as that each of them is a principal and each an agent for the others." If this principle be correct, the defendants are clearly not liable. The surviving partners were not agents of theirs in any sense; all that the defendants did was in an adverse character to them, and was a requirement that they should fulfil their contract with the testator by paying the one-third of the net profits for the benefit of his estate. This principle has been adopted and acted upon in the case of *Bullen* v. *Sharp* (2), and the case of *Re English and Irish Church and University Assurance Society.* (3)

As I have already said, in my opinion the defendants are entitled to the judgment of the Court.

BRAMWELL, B. I am of opinion that the defendants are entitled to judgment. I think the case is governed by *Cox* v. *Hickman.* (4) The effect of that case seems to me excellently stated by O'Brien, J., in *Shaw* v. *Galt.* (5) He says (1): "The principle to be collected from them appears to be, that a partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business; but that the existence of such partnership implies also the existence of such a relation between those persons as that each of them is a principal and each an agent for the others." Now, what are the facts in the present case? [The learned judge read the clause of the articles of partnership under which the representatives of a deceased partner were entitled to a share of profits, and proceeded:—] The representatives of the deceased partner then were not to be partners with the survivors. They would not interfere with the business or its management in any way. They could not say that any particular business should be done by the firm, or that it should not be done, or how it should be done. They could neither make nor order a contract, nor forbid nor perform, nor enforce nor release one. It seems to me, therefore, that there is not here "such a relation between those persons as that each of them is a principal and each an agent for the others."

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(1) 16 Ir. C. L. Rep. at p. 375.

(2) Law Rep. 1 C. P. 86.

(3) 1 H. & M. 85; 30 L. J. (C.P.) 125. 7 Jur N S 105

(4) 8 H. L. C. 268.

(5) 16 Ir. C. L. Rep. 357.

This is all that seems to me necessary for our judgment. But there are certain matters that ought to be noticed. The fact that the defendants Hammond and Gaskell are executors of the deceased partner is immaterial. If the covenant of the partnership deed had been to pay the deceased partner's brother or nominee, and such brother or nominee had received profits as these defendants have done, the conclusion would be the same. A question has been made whether the executors had a right to withdraw the deceased's capital, or were bound to leave it if they took the benefit of the covenant. I think they had a right to withdraw it—if, indeed, there was any property so called. But whether they had such right or not, and whether they have withdrawn it or not, seems to be immaterial, because in none of those cases would there be "such a relation between those persons as that each of them is a principal and each an agent for the others."

So in like way it has been discussed whether the executors would be liable for losses. No doubt the losses of any period ending on the 24th of August and the 24th of February, up to which profits were calculated, would have to be deducted, and the balance only accounted for; whether if after that there was a period of loss the executors would be liable for a third of that loss, or whether if there was a subsequent period of gain the two periods would have to be blended, as it were, to see if there was any and what profit due to the executors, may be a question. I think the executors not liable to losses in the sense of having to pay anything. I

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think the covenant makes no provision for such a case, the parties not contemplating it. But I think this immaterial, because, whatever construction is right, there would not be "such a relation between those persons as that each of them is a principal and each an agent for the others."

I have to add that I abide by all I said in *Cox* v. *Hickman* (1) and *Bullen* v. *Sharp* (2), and with unabated confidence. I need not repeat myself; but it is true in this case that if the executors are liable, they are so contrary to their intention, the intention of the surviving partner, and of the plaintiff—in short, of everybody. The executors could not have refused this business, could not have personally sold the property, could not have insisted on receiving the sum due by the purchaser, and could have maintained no action jointly with the surviving partners for the commission against the plaintiff. Why, in the name of common sense and justice, are they liable to this action? No doubt a partnership is more than a mere constitution of principal and agent. But one partner binds another by force of an authority given to him. It is common and correct to say that a partner has no authority to do so and so, and bind his partner thereby, e. g., an attorney has no authority to accept bills in the name of the firm.

One word more. It is asked, if the defendants are not liable, what was the use of the 28 & 29 Vict. c. 86? If I say none, it would only shew that the Act was useless. In truth it was passed before the effect of *Cox* v. *Hickman* (3) was understood. But see what a consequence would result if these defendants are liable. They are mere trustees for the widow and children. Would the widow be liable? It may be argued, Yes, because the statute (s. 3) makes her not liable only when she receives an annuity. Is it possible, then, that a widow who receives an annuity out of profits is not liable, and one who receives a proportion of profits is? On what principle? If the words had been that the survivors should pay an annuity not exceeding 10,000*l.*, provided that if a third of profits was less, then that such sum only should be paid, the case would be within the statute. Is there to be a difference in the effect where the substance is the same, and the words only different?

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(1) 3 C. B. (N.S.) at p. 552; 27 L. J. (C.P.) at p. 131. 4 Jur NS 89

(2) Law Rep. 1 C. P. at p. 120.

(3) 8 H. L. C. 268; 30 L. J. (C.P.) 125. 7 Jur NS 105

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Will a mere difference in words not used by the plaintiff make a difference, and make a contract with him? Is there to be a difference where, instead of the widow, there is a trustee for her? It seems impossible. I rely on *Cox* v. *Hickman* (1) and the judgments of the majority in *Bullen* v. *Sharp*. (2) I think that, on principle and authority, our judgment should be for the defendants Hammond and Gaskell.

CLEASBY, B. I am of the same opinion for the reasons stated by the Lord Chief Baron. I have looked particularly into what took place after the death of the testator as it regards the position of the defendants, and I am satisfied that there is nothing in it to make them liable. No doubt they are not within the protection of the Partnership Act; it has not been contended that they are. There was clearly no advance, nor any state of circumstances, to which the Act would apply. But, independently of the Act, there is nothing in these transactions to make them partners; no act done by them which brings them into that relation.

I must add, however, that I cannot quite concur in the passage cited by my Brother Martin from the judgment of O'Brien, J., in *Shaw* v. *Galt* (3), to the effect that the existence of partnership is to be ascertained by seeing whether each is principal and agent to and for the others. My view is that agency is in such cases deduced from partnership, rather than partnership from agency. But neither does partnership always imply this mutual agency. In the common case of a partnership, where, by the terms of the partnership, all the capital is supplied by A. and the business is to be carried on by B. and C. in their own names, it being a stipulation in the contract that A. shall not appear in the business or interfere in its management, that he shall neither buy nor sell, nor drawn or accept bills, no one would say that, as among themselves, there was any agency of each one for the others. If, indeed, a mere dormant partner were known to be a partner, and the limitation of his authority were not known, he might be able to draw bills and give orders for goods which would bind his co-partners; but in the ordinary case this would not be so, and he would not in

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(1) 8 H. L. C. 268; 30 L. J. (C.P.) 125.

(2) Law Rep. 1 C. P. 86.

7 Jur NS 105 (3) 16 Ir. C. L. Rep. 357.

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the slightest degree be in the position of an agent for them. I should, therefore, hesitate very much in acceding to the idea that agency is the foundation of the idea of partnership. The definition given in Story on Partnership, § 2, is as follows: "A voluntary contract between two or more competent persons to place their money, effects, labour, and skill, or some or all of these, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them;" and in the same place the author cites the definition of a very accurate writer —Pothier (Traité du Contract de Société, art. prel.)—which he renders thus: "Partnership is a contract whereby two or more persons put or contract to put something in common, to make a lawful profit in common, and reciprocally engage with each other to render an account thereof."

That, in my opinion, explains the general idea of partnership. *Cox* v. *Hickman* (1) is not inconsistent with this. It undoubtedly decides that mere participation in profits does not constitute partnership; and its effect is, that before we can determine whether the relation of partnership exists we must see what the circumstances are under which that participation of profits takes place— whether it takes place under such circumstances as those indicated by Story.

In the present case I am of opinion those circumstances do not exist. I agree with my Brother Martin, that if it had appeared that capital had been voluntarily left in the business by the defendants the case would have been different. But when this fact is negatived there remains nothing from which we can infer the relation of partnership to have existed.

Rule absolute.

Attorneys for plaintiff: *Sale & Co., Manchester.*

Attorneys for defendants: *Milne, Riddle, & Mellor, for Cunliffe & Co., Manchester.*

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(1) 8 H. L. C. 268; 30 L. J. (C.P.) 125.

7 Jur NS 105.

HARRIS *v.* VENABLES AND ANOTHER.

1872
April 30.

Contract—Consideration—Guarantee—Withdrawal of Petition—Forbearance.

The plaintiff having presented a petition for winding up a company, the defendants signed the following guarantee: "In consideration of your withdrawing the petition you have presented for winding-up the company called John King & Co., Limited, we agree to pay you all the costs you have incurred of and in relation to such petition, and to indemnify you against all costs (if any) you may be liable to pay to the company, or to any other parties appearing for or in reference to the petition. We further agree to guarantee the payment to you, within eighteen months from this date, by the company or the liquidator thereof, of the principal of your debt of 722*l.*" In an action on the second branch of the guarantee:—

Held, that the consideration applied to both promises; that the consideration was the withdrawal of the then pending petition, and not the forbearing for eighteen months to proceed with any petition to wind up the company; and that such a consideration was sufficient to support the promise.

Ross v. *Moss* (Cro. Eliz. 560) questioned.

Quære, whether, if the presenting of a second petition had had the effect of preventing the company from paying the debt, the surety would have been discharged.

DECLARATION on a guarantee in the following words:—"To Mr. Henry William Harris—Sir, in consideration of your withdrawing the petition you have presented for winding up the company called John King & Co., Limited, we agree to pay all the costs you have incurred of and in relation to such petition, and to indemnify you against all costs (if any) you may be liable to pay to the company, or to any other parties appearing upon or in reference to the petition. We further agree to guarantee the payment to you, within eighteen months from this date, by the company or the liquidator thereof, of the principal of your debt of 722*l.* 17*s.*, provided that in case the said debt is not paid in full by the company or the liquidator, our liability upon this guarantee shall not exceed 361*l.* 8*s.* 6*d.* Any sum paid by the company in respect of or for interest on such debt shall not be taken into account as against the guarantee. This agreement and guarantee is to be construed as binding us severally as well as jointly. Dated this 21st day of April, 1870. C. J. Venables—H. J. Turner;" alleging performance of the consideration, and generally of

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conditions precedent, and breach of the promise to pay the 361*l.* 8*s.* 6*d.*

Pleas: 2. Denial of performance of the consideration. 3. That at the time of the presentation of the petition in the declaration mentioned, the company was being voluntarily wound up, and liquidators had been and were appointed; that the said petition of the plaintiff was a petition for the compulsory winding-up of the said company by the Court of Chancery; that the plaintiff, after the making of the said promise, and after the alleged withdrawal of his said petition, and before a reasonable time had elapsed, and within the said eighteen months, presented another petition to the Court of Chancery for the compulsory winding-up of the said company by the said Court; and that the presentation of the said last-mentioned petition prevented and retarded the collection of the assets of the company, whereby the defendants were discharged from their said promise.

Cross demurrers to the declaration and the 3rd plea; and issue on the pleas.

The cause was tried before Martin, B., at Guildhall, in the sittings after Hilary Term, 1872.

It then appeared that by a special resolution passed on the 30th of March, and confirmed on the 13th of April, 1872, it was resolved that the company of John King & Co., Limited, should be voluntarily wound up, and liquidators were appointed; that on the 6th of April, 1870 (after the passing and before the confirming of the resolution), the plaintiff presented a petition in Chancery to wind up the company compulsorily; and that the defendants, who were directors of the company, thereupon gave to the plaintiff the guarantee sued upon. Upon his petition coming on for hearing, the plaintiff applied to the Court for leave to withdraw it, and the Court made the following order: "Counsel for the petitioner desiring to withdraw the said petition, this Court doth not think fit to make any order upon the said petition, but doth order that the said Henry William Harris do pay to the said company their costs of the said petition to be taxed, &c."

On the 17th of July, 1871, the plaintiff presented another petition, praying that the company might be wound up by the Court, or that the voluntary winding-up might be continued under

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the supervision of the Court, and that additional liquidators might be appointed. On the 31st of July this petition was dismissed with costs.

It was contended before the learned judge who tried the cause, first, that the document sued upon consisted of two parts, that the consideration only applied to the first part, and that the guarantee sued upon was therefore without consideration; and, secondly, that the consideration had not been performed, the true construction of the words being that the plaintiff was not to press his attempt to wind up the company either by his then pending petition or any other, for eighteen months.

The learned judge held against the defendants upon both points, and directed the jury to consider whether the presentation of the second petition did prevent or retard the payment of their debt by the company. The jury found for the plaintiff.

A rule having been obtained for a new trial on the ground that the learned judge misdirected the jury on the second and third pleas as to what constituted the consideration for the guarantee and as to the necessity of proving the whole of the allegations in the third plea, and also on the ground that all the material parts of the plea were proved at the trial, and the jury should have been so directed; the rule came on to be argued with the demurrers.

Hon. G. Denman, Q.C., and *Benjamin*, shewed cause against the rule and supported the declaration and the demurrer to the plea. The guarantee will not bear the construction put upon it by the defendants, the withdrawal of the then pending petition was a sufficient consideration, and it is the only one mentioned; and even assuming that it would be a good answer to shew that the presentation of the second petition fifteen months after prevented the company from paying their debts, this fact has been negatived by the jury. In the case of *Rolt* v. *Cozens* (1), cited on moving the rule, the terms of the guarantee necessarily implied that there was to be a suspension of proceedings against the debtor till the 13th December, it would have been otherwise if the surety had only bargained for the discontinuance of a pending action.

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(1) 18 C. B. 673; 25 L. J. (C.P.) 254. 2 Jur. N.S. 1073.

Trevelyan, in support of the rule, and of the plea and the demurrer to the declaration. The consideration for the promise was not merely the withdrawal of the then pending petition, but the withdrawal of the plaintiff during the eighteen months from all proceedings to wind up the company. If the construction of the guarantee is otherwise, there is no sufficient consideration for the promise; for the mere discontinuance of an action, or an agreement to forbear per breve tempus is idle, since the plaintiff may commence a new action, or proceed to enforce his demand the next day: *Ross* v. *Moss* (1); Com. Dig. tit. Action on the Case upon Assumpsit, B. 1. Therefore, to make the guarantee good, the defendants' construction must be adopted, and this is confirmed by *Rolt* v. *Cozens* (2) and *Payne* v. *Wilson* (3), which shew that where there is a guarantee to be performed after a certain time in consideration of the creditor's forbearance, the forbearance must be extended over the same period. But, secondly, the guarantee consists of two parts, which are independent of one another. The payment of costs is what the defendants give in exchange for the withdrawal of the petition; the second part, the promise to pay the debt, is without consideration and therefore void: *Wood* v. *Benson* (4); and this is the more clear if the consideration is construed as being only the discontinuance of the pending petition, and not extended by reference to the period of payment.

KELLY, C.B. I am of opinion that the part of the plea which alone has been proved furnishes no defence to the action. It has been contended that there has been no sufficient performance of the consideration stipulated for, and that the defendants are therefore not liable. Certainly the plaintiff did not in terms withdraw his petition, but he made application for leave to withdraw it; and on that application the Court made an order which had the effect of putting an end to the proceeding. That was in substance a performance of the consideration. The second question is, whether the presenting of a subsequent petition constitutes a defence. There is no express condition or stipulation that the plaintiff shall not present another; the question, therefore, is, whether such a condition is implied. No doubt in all contracts by which one party undertakes to another an obligation to pay him a sum of money, or to do any other act, if the other by his own act makes it impossible to perform the obligation, that will be a defence. If therefore the presenting of the petition had had the effect of disabling the company, it might have been equivalent to a disabling of the defendants, and so a non-performance of an implied condition. But the jury have found that the presenting of the petition had not the effect of preventing the liquidation of the debt by the company; in other words, that it had no substantial effect on the performance by the defendants of their promise. The material part of the plea is therefore not proved.

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(1) Cro. Eliz. 560.

(2) 18 C. B. 673; 25 L. J. (C.P.) 254.

2 Jur. N.S. 1073.

(3) 7 B. & C. 423.

(4) 2 Tyrw. 93; 2 C. & J. 94.

MARTIN, B. I am of the same opinion. It is obvious the plaintiff could not himself withdraw his petition, but he went to the Court and obtained from it what was equivalent to a withdrawal. This performance constituted a sufficient consideration; it was a thing which might be injurious to him, and beneficial to the defendants, or at least to the company; and in consideration of that performance the defendants promised two things: first, that they would pay the plaintiff his expenses of the petition; and, secondly, that they would guarantee the payment of a sum due by the company. The defendants are now sued on the second promise, and they set up that the plaintiff, fifteen months after the agreement, presented another petition against the company, which was dismissed with costs. The plea alleges, not only that the petition was presented, but that the company were damaged by it, and were prevented from paying the debt; but the jury have found the contrary, and the defendants must therefore rest their defence on the fact of the petition being presented without damage, which is clearly insufficient.

BRAMWELL, B. I am of the same opinion. First, Mr. Trevelyan says "withdraw" means "not to present or persevere in a petition against the company for the space of eighteen months;" and he says it must mean this, because if it only meant that the plaintiff would withdraw his petition for the moment, there would be no consideration and no valid contract. For this position he cites

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Ross v. *Moss* (1), which certainly goes very far; but whether that case is good law, and would be decided in the same way now, I will not say. If a man expressly contracts that on a particular petition being withdrawn he will pay a sum of money, that is a good contract; it was his own folly not to provide against another petition being filed. It is obvious that a real benefit is gained by the withdrawal, because of the disinclination to commence a new proceeding, after so much labour and expense have been wasted. I cannot but doubt, therefore, whether *Ross* v. *Moss* (1) is good law; and I think that a promise made in consideration of such an agreement would be good.

But still the question remains, whether the words mean in fact "withdraw this petition and not present a new one." I think not. In *Rolt* v. *Cozens* (2), the plaintiff was to forbear for some time. For what time? That was indicated by the nature of the transaction; it was to be the time at the expiration of which the defendant was to pay. Therefore, although the case is at first striking, the circumstances shew that it does not govern us here.

As to the second question, whether the consideration applies to both promises, I hold that it does. You are not bound to repeat the consideration throughout the contract; all that is to be done on one side is the consideration for all that is to be done on the other; all the promises are referred to all the considerations. The case of *Wood* v. *Benson* (3), cited in support of the defendants' argument, seems to turn on this, that no time being fixed for which the gas was to be supplied, if the supply was the consideration for the obligation to pay the arrears as well as to pay for the gas to be supplied, this absurd consequence would follow, that a supply for one day would compel the defendant to pay, not for that day only, but for many days before. The Court, therefore, came to the conclusion that the contract was good only so far as gas was supplied, but did not bind the defendant to pay for arrears.

CLEASBY, B. I am of the same opinion. I should be sorry to agree to anything sanctioning the idea that a creditor who intends to rely on the contract of a surety, can do anything to prejudice

(1) Cro. Eliz. 560.
(2) 18 C. B. 673; 25 L. J. (C.P.) 254.
(3) 2 Tyrw. 93; 2 C. & J. 94.

[2/5 C 2 Jur N.S. 1073.

the power of the principal debtor to pay. But the allegation which the defendants have inserted in their plea (and which they cannot now be heard to say is immaterial) is that the company was prevented by the second petition from paying the debt. This is, indeed, the only way in which the defence could have been put, namely, that the presenting of the petition prejudiced in fact the means of the debtor. But the jury have negatived this fact, which is the substantial part of the plea.

As to the second question, I also agree that where in a document the consideration is stated at the beginning, all the subsequent provisions are referred to it. The whole is one thing, and you cannot stop in the middle.

As to the withdrawing the petition, it is not disputed that this was done in substance, and in the only mode in which it was possible; and that being the only consideration, the plaintiff has fully performed his part of the contract.

Trevelyan. Upon the demurrer to the plea, however, the defendants are entitled to judgment.

PER CURIAM. No, the plea does not sufficiently allege that the company were disabled.

Rule discharged, and judgment for the plaintiff on the demurrers.

Attorneys for plaintiff: *Willoughby & Cox.*
Attorneys for defendants: *Westall & Roberts.*

1872
May 6.

20 Eq 685
11 Ch D 909
5 Ex D 171,
14 Ch D 125
17 Ch D 750
9 QBD 284
28 – 4 290
297
22 Ch D 179
21 – 2
416

SMYTH *v.* NORTH.

Landlord and Tenant—Disclaimer of Lease by Trustee in Bankruptcy—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 23.

The assignee of a lease became bankrupt, and his trustee disclaimed under s. 23 of the Bankruptcy Act, 1869. In an action brought by the lessor against the lessee upon his covenant in the lease, to recover rent which accrued due between the order of adjudication and the disclaimer:—

Held, that the lessee was liable; and by Martin and Pigott, BB. (Bramwell, B., dissenting), that a disclaimer under s. 23 by the trustee of the assignee of a lease does not affect the rights and liabilities inter se of the lessor and original lessee.

Action for rent, brought against the defendant as executor of H. S. Waring, on testatrix's covenant to pay rent contained in a lease from the plaintiff to her.

Plea 2. On equitable grounds, that the defendant assigned the lease to F. Bennett; that F. Bennett was adjudicated bankrupt under the Bankruptcy Act, 1869; that the trustee in bankruptcy, by the permission of the Court, disclaimed by deed the property of and in the said term; that the present action was commenced after the disclaimer; and that the plaintiff's claim had not accrued at the date of the adjudication.

Demurrer and joinder.

Pollock, Q.C. (*Lumley Smith* with him), in support of the demurrer. The question turns on s. 23 of the Bankruptcy Act, 1869 (1), which provides that, on disclaimer of a lease by a trustee in bankruptcy, the lease shall be deemed to have been surrendered on the date of the adjudication. This section relates entirely to the rights and liabilities of the bankrupt and his creditors inter se, which is the scope and purpose of the whole Act. It is no part of the design of the Act to disturb the rights and contracts of third persons, and no reason can be given why the solvent lessee should be discharged of his liability because his assignee has become bankrupt. This was the view taken of the corresponding section of 6 Geo. 4, c. 16, s. 75, in *Manning* v. *Flight* (1), where under similar circumstances the lessee was held not to be discharged from his covenants. By that section, however, as well as by the similar section (s. 145) of 12 & 13 Vict. c. 106, it was only provided that the lease should be delivered up to the lessor, which was an inartificial mode of expressing that the bankrupt's interest was put an end to. To make the expression more accurate, the present Act provides that the lease shall be deemed to have been surrendered. This, if taken in its strict sense, carries the matter too far; but it is plain that the same thing is intended in substance, and that the words must be read as meaning that, as between the lessor and the bankrupt, the lease shall be deemed to have been surrendered.

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(1) By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 23, "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, &c., the trustee . . . may, by writing under his hand, disclaim such property; and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication; and if the same is a lease, be deemed to have been surrendered on the same date; and if the same be shares in any company, be deemed to be forfeited from that date; and if any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the Court, and

[BRAMWELL, B. The lessee has parted with his interest in the property. Can he nevertheless be sued until the expiration of the period for which the lease was granted?]

If the lessor accepts the possession of the premises, there will be a complete surrender, and the covenant will be gone; if not, the interest of the lessee is provided for by the clause of the section which gives the Court power to make orders as to the possession of the premises. But this plea must in any case be bad, for it shews that the rent accrued due before the disclaimer. It is impossible that it can have been intended without express words to divest a vested cause of action.

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the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just. Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

(1) 3 B. & Ad. 211.

Field, Q.C. (*Ollivant* with him), in support of the plea. The change in the language of the Act shews that it was intended to go further than the repealed Acts, and it is impossible to give effect to the words without holding that the term is altogether gone. The difficulty existed under the old Acts that, although a bankrupt lessee was discharged as from the date of the adjudication, his surety was not, and might, therefore, although the assignee afterwards delivered up the lease, be called upon to pay rent accruing between the adjudication and the delivery: *Tuck* v. *Fyson.* (1) It was to meet this difficulty that the provision was enacted in its present form, the effect of which is that the estate is upon disclaimer wholly determined as from the date of the adjudication. But where the estate is gone the covenants are gone with it, the continuing estate being the basis and an implied condition of the continuing obligation: *Pitman* v. *Woodbury.* (2) The plaintiff is not without his remedy. The Apportionment Act, 1870 (33 & 34 Vict. c. 35), s. 2, makes rents accrue from day to day, so that he is entitled to recover up to the date of adjudication; and for any loss which he may sustain by reason of the determination of the lease he may prove under the final clause in the section. (3)

MARTIN, B. We are all of opinion that the defendant's plea is bad, though not all for the same reason. I am firmly convinced that s. 23 of the Bankruptcy Act, 1869, does not apply to this case at all; but only affects the relations between the bankrupt and his trustee, and the lessor. It may have the effect of discharging the person or estate of the bankrupt, but not a third person against whom the plaintiff has a vested right of action. It is said the section destroys the estate and divests it from the defendant; but I think that is not its effect. It is argued that if the plaintiff is injured he has a remedy under the final clause of the section, which enacts that, "any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury;" and that this amounts to requiring him to come in and prove under the bankruptcy. If this had been the intention of the legislature, I think they would have said so expressly; as

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(1) 6 Bing. 321.

(2) 3 Ex. 4.

(3) See *Ex parte Llynvi Coal and Iron Co.*, Law Rep. 7 Ch. 28.

14 ChD12

they have not, it appears to me that the principle of *Manning* v. *Flight* (1) applies, and that the plaintiff is entitled to recover.

BRAMWELL, B. I also think that the plea is bad. However, but for the contrary opinion of my learned Brothers I should have thought it quite clear that, if the rent had accrued after the disclaimer, the defendant would have been entitled to judgment. The words of the Act are quite plain, that "upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have been surrendered on the same date." Now surrender means the act of surrendering by the lessee, and the acceptance of that surrender by the lessor; the one cannot surrender unless the other accepts. Therefore, when the statute uses that word it imports the whole transaction on both sides. But not only are the words plain, but if this were not so, a sort of impossible consequence would follow. Who on this supposition is entitled to the land? Surely not the bankrupt. The section, after providing for the case of contracts, leases, and shares, expressly enacts that as to "any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person so entitled, then in no case shall any estate or interest therein remain in the bankrupt." If the landlord is entitled, then the absurdity follows that he has (on the construction of the plaintiff) both the land and the rent. It cannot be said the lessee has it, for he has parted with all his interest, and there is no provision that it shall revest in him; the statute should on this view have said, not that the lease shall be deemed to be surrendered, but to be assigned back to the original lessee. Not only the words of the statute, therefore, but the necessary consequences of the provision are in favour of the construction which I put upon it.

It is said that the lessor may thus find himself deprived of the security of a solvent tenant to whom he let his premises at a high rent, and get his property thrown back on his hands when rents have fallen. That is a misfortune; but all we can say is, that the legislature have not guarded against it, except by giving the lessor the right of proving against the bankrupt's estate for the loss which he has sustained. To free the bankrupt, which is the object of this legislation, there must be an injury to some one.

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(1) 3 B. & Ad. 211.

But I think the plea is bad for this reason. It does not say that the rent sued for became due after the disclaimer, but only that it became due after the adjudication. But it cannot have been intended to divest a vested cause of action, which would be the effect of upholding this plea. It is impossible to suppose that if the plaintiff had brought an action and recovered judgment by default, and the lease was afterwards disclaimed, this would be a good ground for an audita querela. The words are, no doubt, that the lease is to be deemed to have been surrendered "from the date of the order of adjudication;" but this must, perhaps, be taken to mean, so as not to give rise to any fresh rights or liabilities as between the landlord and the bankrupt, not for all purposes. I think, therefore, the plaintiff is entitled to judgment.

PIGOTT, B. I also think the plea is bad for want of an averment that the causes of action arose after the disclaimer. But, further, I agree with my Brother Martin as to the application of the statute, and the meaning of the word "surrender," as used in it. I cannot imagine that it was intended that the statute should by an ex post facto effect annul contracts which had been entered into long before; and this would be the effect of giving the word "surrender" a strictly technical meaning. I think, therefore, that the Act only applies as between the bankrupt and his creditors; when he is the assignee of a lease, the relation of the lessor and the original lessee is not disturbed, and the lessee must seek his remedy in the clauses at the end of the section, which give the Court power to make orders for the delivery of possession of the disclaimed property to persons interested in it, and allow persons injured by the operation of the section to prove against the estate.

Judgment for the plaintiff.

Attorneys for plaintiff: *Lee, Pemberton, & Reeves.*
Attorneys for defendant: *Crawley, Arnold, & Green.*

[IN THE EXCHEQUER CHAMBER.]

1872
May 11.

7 CP 257
1 P.D. 11

THE LORDS BAILIFF-JURATS OF ROMNEY MARSH *v.* THE CORPORATION OF THE TRINITY HOUSE.

Negligence—Proximate Cause—Natural Forces.

The defendants' vessel, owing to the negligence of their servants, struck on a sand bank, and becoming from that cause unmanageable, was driven by wind and tide upon a sea wall of the plaintiffs', which it damaged. Having regard to the state of the weather and tide it was impossible to prevent this, the ship having once struck:—

Held, affirming the judgment of the Court below, that the defendants were liable for the damage caused to the wall.

Error from a decision of the Court of Exchequer in favour of the plaintiffs on a special case. (1)

Pollock, Q.C. (*Dixon* with him), argued for the defendants.

Sir G. Honyman, Q.C. (*Biron* with him), for the plaintiffs, was not called on.

Blackburn, J. We are all of opinion that the judgment of the Court of Exchequer should be affirmed. The damage caused is stated to have been the inevitable consequence of the ship striking the bank through the defendants' negligence. That being so, they are clearly liable.

Keating, Mellor, Lush, Brett, and Grove, JJ., concurred.

Attorneys for plaintiffs: *Austen, De Gex, & Harding.*
Attorneys for defendants: *Symes, Sandilands, & Co.*

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(1) Law Rep. 5 Ex. 204.

1872
April 22.

10CP81

WHITECHURCH AND OTHERS (CHURCHWARDENS AND OVERSEERS OF ST. MARY ROTHERHITHE) *v.* EAST LONDON RAILWAY COMPANY.

Rating—Liability of Company to make good Deficiency in Rates.

By the East London Railway Act, 1865, the defendants were authorized to construct a system of railways numbered 1 to 7; and by s. 128 it was enacted that "if and while the company are possessed under this Act of any lands assessed or liable to be assessed to any sewers rate, consolidated rate, poor-rate, police rate, main drainage rate, church-rate, or other parochial or ward rate, they shall, from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates, by reason of those lands being taken or used for the purpose of the railway or works; and the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated."

No. 1 railway (which was the principal line) passed through R. parish, and through W. parish. The whole of that part of it which passed through R. parish was completed and actually worked; but the part in W. parish was unfinished, as were also several of the other railways.

Held (by Kelly, C.B., Bramwell and Cleasby, BB., Martin, B., dissenting), that the whole of the line within R. parish being complete and capable of being assessed as a working railway, the defendants were no longer liable to make good the deficiency in the rates.

By Bramwell, B.: The same consequence would follow with respect to any portion of the railway which was completed and actually worked; although some other portions within the same parish were unfinished.

By Martin, B.: That the case was concluded by the authority of *Reg.* v. *Metropolitan District Ry. Co.* (Law Rep. 6 Q. B. 698).

Revd in Ex Ch Vol 7 Ex 424 (1)

SPECIAL CASE stated in an action brought by the churchwardens and overseers of St. Mary, Rotherhithe, to recover from the defendants a sum of 310*l.*, the deficiency in the poor-rate, paving and general purposes rate, lighting rate, and sewers rate, upon lands taken by the defendants under their Act.

By the East London Railway Act, 1865 (28 & 29 Vict. c. li.), the defendants were authorized to make certain railways specified in s. 22, which railways were, by this title of the Act (1), to be called "The East London Railway." The railways were numbered respectively 1 to 7; No. 1 was the principal line, and was to commence

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(1) 28 & 29 Vict. c. li.: "An Act for the construction of railways to connect, by means of the Thames Tunnel, certain railways on the Surrey side of the River Thames, with certain railways on the Middlesex side of the river, to be called 'The East London Railway'; and for other purposes."

(1) Judgt in Ex Ch Revd by H of L LR HL 81.

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in Bethnal Green, and to pass through Wapping parish, through the Thames Tunnel, and through Rotherhithe and Deptford parishes, to New Cross, Deptford.

By s. 128, it is enacted that "if and while the company are possessed under this Act of any lands assessed, or liable to be assessed, to any sewers rate, consolidated rate, poor-rate, police rate, main drainage rate, church-rate, or other parochial or ward rate, they shall from time to time, until the railway (1) or the works thereof are completed and assessed or liable to be assessed, be liable to make good the deficiency in the assessment for such rates by reason of those lands being taken or used for the purposes of the railway or works, and the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated."

The defendants were possessed under the Act of lands in Deptford and Rotherhithe parishes, on which they had constructed a railway and stations, forming part of No. 1 railway mentioned in the Act. So much of No. 1 railway as was within those parishes (viz., from Wapping Station at the north end of the Thames Tunnel to New Cross), was complete with its stations, and had, by an agreement dated the 17th of November, 1869 (confirmed by 33 & 34 Vict. c. lv. s. 16), been let to the London, Brighton, and South Coast Railway Company, which had in the following month of December opened the line for traffic, and had ever since occupied and worked it.

The whole of No. 4 railway was also completed, and was, with the completed part of No. 1, comprised in the agreement of the 17th of November, 1869; but numbers 2, 3, 5, 6, 7, and the remainder of No. 1, were not yet finished.

Whilst No. 1 railway was being constructed within Rotherhithe parish, the defendants paid to the plaintiffs the deficiency of rates in their parish; but after the portion above mentioned was completed, they refused to continue the payment, considering the railway as "liable to be assessed" within s. 128; and at the same time the London and Brighton Railway Company claimed to be rated as occupiers of the same completed portion. By a rate made on the 13th of April, 1870, the London and Brighton Railway Company were rated on a rateable value of 1181*l.*, the rate being based on the rentals in respect of which the defendants had paid the deficiency during the construction of the line; but the company objected to the rate, alleging that the true rateable value of the railway was only 150*l.* The plaintiffs did not collect the rate, but claimed to have the deficiency made good by the defendants under s. 128. The deficiency in the rates of the 13th of April and the 5th of October, 1870, amounted to 310*l.*

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(1) By s. 4, "The expression, 'the railways,' shall mean the railways, stations, works, and conveniences, or any or either of them, or any part thereof, by this Act authorized;" there was no interpretation of "railway" (in the singular).

The question for the opinion of the Court was, whether the defendants were liable to pay the said deficiency.

Prentice, Q.C. (*Morgan Howard* with him), for the plaintiffs, relied upon *Reg.* v. *Metropolitan District Ry. Co.* (1), which was, he contended, identical with this case.

Sir J. B. Karslake, Q.C. (*Poland* with him), for the defendants. The case cited is not applicable, because here the railway is complete within the parish; there it was not. (2) Moreover, the language is different. But the principle of that case is erroneous. The intention of the Act is to provide for the time during which the railway is in course of construction, and whilst it is therefore of no rateable value; as soon as it is a working railway within the parish it is liable to be assessed, and the obligation on the defendants to make up the deficiency ceases. It may be conceded that s. 128 was inserted for the benefit of the parish; but it was never intended that the parish should be protected for all time against loss; nor is there any reason why it should. A similar loss might be caused by any private individual who changed the destination of his land; but the parish would in that case have no cause for complaint. Moreover, if the railway is to be held not liable to be assessed till the whole system is complete, the absurdity will follow, that if in a line of many miles some small and inconsiderable piece remains unfinished, the obligation will still continue, although the

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(1) Law Rep. 6 Q. B. 698.

(2) This appears to have been the case as to the 1868 rates, which were included in that case, but not as to all the rates of 1869 (see pp. 701, 702).

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whole of the main line is open for traffic and actually worked, and is actually assessed in other parishes. On the other hand, the effect of the Act according to the plaintiffs' construction might be to prevent the parish from levying an improved rate; for if the railway is not liable to be assessed for one purpose, it is not liable to be assessed for another.

[CLEASBY, B. Has not the parish an option ?]

It would be unjust if in parishes where the former rateable value was high the deficiency could be claimed, and in parishes where it was low, the improved rate. No such intention appears in the Act. There would be more reason for such a contention under s. 133 of the Lands Clauses Act, 1845, where the word "assessed" only is used; but here the words "or liable to be assessed" are introduced.

[BRAMWELL, B. Why is not the clause applicable successively to the several parcels of land over which the railway is completed, independently of parochiality ?]

It is sufficient in the present case to say that at least, if with respect to the whole parish in which the rate is levied the railway is complete—that is, complete as a working railway—it is liable to be assessed, and the obligation to make good the deficiency ceases.

Prentice, Q.C., in reply, cited *Wheeler* v. *Metropolitan Board of Works* (1) and *Mayor of London* v. *St. Andrew's, Holborn.* (2)

CLEASBY, B. I think the defendants are entitled to our judgment. The question turns upon s. 128 of the East London Railway Company's Act, 1865, but we cannot decide it without considering the entire legislation on this subject. The Lands Clauses Act, 1845, s. 133, provides a general rule that, "if the promoters of the undertaking become possessed, by virtue of this or the special Act or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor-rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor-rate, be liable to make good the deficiency in the several assessments for land tax and poor-rate by reason of such lands having been taken or used for the purposes of the works."

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(1) Law Rep. 4 Ex. 303.

(2) Law Rep. 2 C. P. 574.

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I cannot but think that, under this section, if land were taken in several parishes, and the works were completed and were actually assessed in one parish, the liability to make good the deficiency in that parish would have ceased. At the same time, the parish appears to have some option whether to assess or not; I do not find any compulsion on them to assess. If they improperly abstained from rating the company, they might, perhaps, be compelled by the Queen's Bench to do so; but there is nothing to compel them to rate the company merely for the purpose of ascertaining whether it would be more beneficial to them to do so or to call on the company to make good the deficiency. As soon, however, as the rate is made on the company their liability ceases, without reference to the benefit to the parish. By s. 128 of the East London Railway Company's Act this difference is made in the general rule; it introduces other rates besides the poor-rate, and it also introduces new terms; the words are, "until the railway or the works thereof are completed and assessed or liable to be assessed." Dealing with the question apart from the case in the Queen's Bench, I think the fair construction is this: assuming that in a particular parish where a rate is levied the railway is completed and used as a railway, and therefore liable to be assessed, the section ceases to operate, and the company is exempted from liability to make good any deficiency. With regard to what was thrown out by my Brother Bramwell, as to whether in the case of a large parish, if the railway was completed and worked in a part of the parish, the liability to make good the deficiency would continue merely because the whole line in the parish was not completed, although I cannot see any answer to his reasoning, I could not say that the section would in that case cease to operate. But that question is not before us. I treat the case as that of one railway completed in the parish, one rate and one deficiency.

As to the case of *Reg.* v. *Metropolitan District Ry. Co.* (1), in the Queen's Bench, if I thought it in point, I should certainly not venture to dissent from it. But it is distinguishable on two grounds; first, the facts are different; and, secondly, the Act of Parliament is different.

The facts are different, because in that case only a part of the

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(1) Law Rep. 6 Q. B. 698.

Poor 437

railway in the parish was completed, and the time had not arrived for making a rate upon the railway in the parish.

The Act of Parliament is different, because the word "railways" is used, and by the interpretation clause (s. 2) the word "railways" means the railways and the works connected therewith by this Act authorized to be constructed. (1) I do not see how the Court could, without making a new Act of Parliament, construe the word "railways" into the railway in a particular parish. In the present case the word "railway," not "railways," is used, and we have no such difficulty as in the other case, which does not therefore apply.

BRAMWELL, B. Independently of authority, I am of the same opinion. To construe the words in question, let us see what was the probable object of the legislature. It was not to indemnify the parishes and wards absolutely against loss for all time, for it is certain that when the railway is wholly made and completed they will have to bear the loss, if any; nor is there any reason why they should not. The inhabitants at large must, like private individuals, take their chance of better or worse. The railway may be of less value than what it displaces, or greater, as might be the case, if no parliamentary powers were exercised. But it may, perhaps, be intended to indemnify the parishes and wards during the construction of the railway.

What I think, however, is really meant by the legislature is this: possibly for the benefit of the parishes and wards, but, as I think, for the benefit of both parties, and to preclude disputes as to the rateable value of the land taken by the company whilst it is in a condition in which it is not practically possible to put a value upon it, it is provided that during that time the land shall not be rated, but the company shall make good the deficiency; but as soon as the land can be assessed as a railway, then the reason of the provision ceases, and the obligation to make good the deficiency is at an end. The new value may be either more or less than the former value; that does not affect the question.

That being the intention of the Act, the words are not limited to rates which are strictly parochial rates; all rates falling on the land are subject to the same difficulty; the question is not, therefore, one of parochiality; and the meaning is, that until any parcel of land taken and used for the construction of the works, which would have been subject to assessment, is covered by or converted into a railway, and the railway is in such a state of completeness as to be assessed or liable to be assessed, the obligation to make good a deficiency exists; but no longer. I do not say merely if the railway is in a sense completed, but not so as to be worked, for then it would not be liable to be or capable of being assessed as a railway; but what I mean is that as soon as it can be considered to be a railway, that is, a railway capable of working and of assessment as such, the obligation ceases. In other words, the Act says, since the company is going to take many portions of land, in respect of each of which the occupier is subject to separate assessment, the company shall make good any deficiency in respect of the non-rating of any such portion of land during the time whilst the railway is in course of construction, and until it is a working railway.

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(1) See Law Rep. 6 Q. B. at p. 700, n.

It appears to me to support this view, that the words "railway *or* the works thereof" are used, which seems to imply that without the railway being completed, some of its works may be. I should observe that the language of the section is not accurate; it speaks of the railway being "completed and assessed or liable to be assessed," whereas it should speak of the railway being completed and being occupied by persons assessed or liable to be assessed in respect thereof; if the clause were so drawn, the meaning would be clearly as I have stated it.

This is certainly the reason of the thing; no reason can be given why, because some small portion of the works not essential to the general scheme, but perhaps for the convenience of places unconnected with the immediate neighbourhood, or for the private purpose, of the railway, is not completed, the company should still remain liable; yet this consequence would follow if the plaintiffs are right.

Another point which strikes me forcibly is this. If any portion of the railway is made and actually worked, surely it is assessable, although the company worked that part of the line only; certainly there is no provision that it shall not be. Then, are they to be assessed, and still to make up the deficiency? That cannot be.

If not assessable until the whole is completed, it may be that the completed part is of double the former rateable value. Can the company then say, "We will only make up the deficiency of the old rate"? That would not be reasonable. Or has the parish the unjust option of assessing or claiming the deficiency? I think the meaning is that they are to be liable to make up the deficiency as to the land which they take while they are constructing the railway upon it; but as soon as it is a working railway they shall be liable to be assessed in respect of it as such, and the provisional obligation ceases.

What, with great respect, seems to me the mistake, or rather one mistake, is this; the railway is treated as a whole; as though it at once took all the lands it wanted. Now it may be that several years will elapse between the times when parcels of land are taken; for instance, the land for a tunnel may be taken, and level land left for years after and occupied for ordinary purposes. The occupier will have to be assessed, and the deficiency made good on the part taken. So, suppose a house were taken and occupied by the railway makers for the purposes of their works, though to be pulled down eventually; surely it would have to be assessed. These considerations go to shew that the deficiency to make up is not a deficiency on the whole line, but on the parcels. In thus reading the statute no words are added to it. It is also to be remembered that, as my Brother Cleasby has pointed out, this is part of a general subject of legislation.

As to the case in the Queen's Bench, I should have had great difficulty in distinguishing it; but I am glad to find that my Brother Cleasby thinks it can be done.

MARTIN, B. I am sorry to differ from the other members of the Court, but I do so because I think that they add words to the Act of Parliament. The Act says, "until the railway is completed," and they read it as if it said "until the railway is completed in any parish." Therefore, if the question were a new one I could not agree with their judgment. But I think, also, that the case of *Reg.* v. *Metropolitan District Ry. Co.* (1) is directly in point, and that it is impossible to read the judgments of my

(1) Law Rep. 6 Q. B. 698.

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Brothers Keating, Lush, and Hannen, without seeing that the reasons of their judgments apply to the present case. The present Act, like the Act in that case, authorizes the making of several railways, the line in question being one; and the only distinction I can see is that here the word "railway" is used instead of "railways." But I cannot think that makes any difference in the reason of the thing. The effect of the clause according to the ordinary meaning of the words is, that until the whole railway shall have been completed as a working line the company shall make good the deficiency. What my Brother Keating says (1), in my opinion, expresses the true view. "And there seems to me to be good reason for making the completion of the works the terminus at which the liability of the railway company shall cease; the reason is this, the rateability of any portion of the railway passing through any particular parish can never be accurately and fairly ascertained until the whole works have been completed; when the works have been completed, then the rates can be apportioned with justice to the parishes and with justice to the company, and they cannot, until the completion of the railway, be fairly apportioned. Sir John Karslake, in his very ingenious and able argument, suggested this construction of the section, namely, that what the legislature intended was, that when any portion of the railway in the parish was completed, or rather was beneficially occupied by the company—that is, workable and worked—then that portion was to be assessed at its present value, and the remainder of the land not taken or beneficially occupied was to be valued at the rental which existed at the time of the passing of the Act. The infirmity, as it seems to me, of that suggestion is this: Sir John Karslake was obliged to admit, that in a certain contingency the parish would be the losers. If anything appears to me clear upon this enactment, it is that the legislature intended that the parish should not lose; and therefore I do not think that that construction, however ingenious, can fairly be put upon this section." In my opinion that applies entirely to the present case, and I think we cannot decide against the plaintiffs without overruling *Reg.* v. *Metropolitan District Ry. Co.* (2)

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(1) Law Rep. 6 Q. B. at p. 704.

(2) Law Rep. 6 Q. B. 698.

KELLY, C.B. I agree that the defendants are entitled to judgment. The question turns entirely on the meaning of s. 128 of the East London Railway Company's Act, 1865. Now, to put a meaning on the words used in a statute, we must see what is the mischief which was intended to be remedied. It appears to me that it was this: the company obtaining powers to take land and construct a railway through a particular parish, so long as the railway in that parish is incomplete and not in a condition to be worked with profit, the principle on which it is to be assessed, and indeed the question whether it can be assessed at all, is full of difficulty and open to much uncertainty. If it is only partly proceeded with, it is difficult to say that it is of any assessable value, or that it can be estimated at all with reference to the assumed tenant from year to year. Under these circumstances it is sought to meet the difficulty by enacting, that while the railway is in this unfinished condition, occupying land which was before liable to be assessed, the company shall be liable to make good the amount which the parish would have been able to obtain from the land if it had continued in its former state. For how long a period then is this remedy to extend? Why, as long as the railway is unworkable, and cannot be applied to a remunerative purpose, and whilst, being thus worth nothing, some such provision as this is necessary to do justice to the parish. But as soon as it is a complete and going railway over the whole of the land in the parish, then the obligation ceases. In other words, when it is so far complete as to enable the parish to assess it in the ordinary way—when, as here, it is occupied at a rent by a lessee who works it, then the mischief ceases, and the necessity for this Act is at an end. Whenever, therefore, a portion of the railway comprising all the lands in the parish, is completed so as to enable the railway to be used in the parish and the parish to assess it, the obligation to make good the amount exists no longer. That is the case here: No. 1 line, one of a cluster of railways authorized by the Act, is not indeed complete throughout, but it is complete through the whole of Rotherhithe parish, and is actually worked over the whole of that portion of its length; it is therefore in a condition to be assessed by the parish, and the whole of the effect sought to be produced by the Act of Parliament has been exhausted.

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Besides the reasons I have already given, when we consider the consequences which would follow if the construction contended for by the plaintiffs were correct—for instance, that in the case of a railway of many miles in length the company would be liable to make up the deficiency in the original assessment, if only some small and insignificant portion of the whole line remained uncompleted; and that on the other hand, unless an option is given to the parish (of which there is no indication) either to assess in the ordinary way or to claim payment of the deficiency, the parish might under the like circumstances be disentitled from recovering the amount of an increased rate which they could otherwise have levied, the view which I have expressed is strongly confirmed, and it is impossible not to see that to hold otherwise would be to produce a state of things which the legislature cannot have contemplated, and for a long period of time, and perhaps even permanently, to substitute in place of the ordinary method of assessment, a method which was only intended for a temporary remedy.

With respect to the case of *Reg.* v. *Metropolitan District Ry. Co.* (1) it is impossible to deny that many of the reasons given by the learned judges apply entirely to the present case. If it were necessary for the decision of this case, I should feel myself compelled to dissent from those reasons. But it is sufficient to say that that case can be distinguished from the present on two grounds. First, the word there used was "railways," and not "railway," and that word was governed by an interpretation clause which made it perhaps impossible to put a literal construction on the clause in question without applying it to the whole system. Secondly, the whole line of railway within the parish is here completed, from one end of the parish to the other, and is actually opened and earning remuneration; there only a portion of the line within the parish was complete. The present case, therefore, may be decided without overruling the judgment of the Queen's Bench.

Judgment for the defendants.

Attorneys for plaintiffs: *Hawks, Willmott, & Stokes.*
Attorneys for defendants: *Wilson, Bristow, & Carpmael.*

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(1) Law Rep. 6 Q. B. 698.

BRADFORD AND ANOTHER *v.* WILLIAMS.

1872
May 4.

8 Q.B. 16.
9 C.P. 212
16 B.D. 18
2 Q.B.D. 18
7 Q.B.D. 96

Charterparty—Condition Precedent—Refusal to continue Performance.

The plaintiffs by charterparty, dated the 26th of May, 1871, agreed with the defendant that the defendant's ship should sail to B., and there load from the plaintiffs' factors a cargo of coals and proceed therewith to H. or D. and deliver same on being paid freight at the rate of 2*s.* 9*d.* per ton in cash on unloading and right delivery. The ship was to be loaded and discharged with all possible despatch, and to load with G. or H. till end of September, at captain's option, but after September with H.; and was to continue at the above rate until March, 1872. In September the captain exercised his option in favour of loading with G., but the plaintiffs refused to load him from G.; whereupon the defendant declined further to perform the charterparty:—

Held, that the breach of the charterparty which the plaintiff had committed went to the root of the contract between the parties, and justified the defendant in his refusal.

DECLARATION that the plaintiffs and the defendant entered into a charterparty dated the 26th of May, 1871, in the terms following:—"Bridgwater. It is this day mutually agreed between Captain Gower, of the ship *Ark*, now at Highbridge, and Messrs. Bradford & Sons (the plaintiffs), that the said ship being tight, &c., shall, with all convenient speed, sail and proceed to a loading berth at Bullo, and there load from the factors of the affreighters a full and complete cargo of coals, ... and being so loaded, shall therewith proceed to Highbridge or Dunball, and deliver the same on being paid freight at the rate of 2*s.* 9*d.* per ton. . . . The freight to be paid, on unloading and right delivery of the cargo, in cash; to be loaded and discharged with all possible despatch; working days to be allowed the said merchants (if the ship is not sooner despatched) for loading the ship as above, and days on demurrage, at pounds per day. Vessel to load with Gollop & Co., or Gould and Co., till end of September, with captain's option; after September, at Gould & Co. . . . . It is understood the vessel shall continue at this rate and term until end of March, 1872, and to discharge equally at Dunball and Highbridge;" that the defendant was then the owner of the *Ark*, and that subsequently she proceeded to Bullo and there loaded a cargo, and therewith proceeded to Highbridge and there delivered the same, and after the making of the charter-

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party, and until September, 1871, made divers successive voyages under it; that all conditions, &c., were fulfilled, yet the ship did not, during the period of time commencing with September, 1871, or at any time afterwards, continue to perform the things agreed upon, and the defendant, although requested so to do, would not cause or permit the ship, after the commencement of September, or at any time other than the time between the date of the agreement and September, to proceed to the loading berth at Bullo and there load from the factors of the affreighters a full and complete cargo whereby, &c.

4th plea: That after the commencement, and long before the end of September, and before breach, the vessel was at Bullo ready to load, according to the terms of the charterparty, and the captain exercised his option by electing to load from Gollop & Co., of all which premises the plaintiffs had notice, and although all things happened, &c., necessary to entitle the defendant to have the vessel loaded in the month of September by the plaintiffs from Gollop & Co., yet the plaintiffs were not ready and willing to cause the said vessel to be loaded in the said month or at any subsequent time from or with Gollop & Co., according to the terms of the agreement, but, on the contrary, absolutely refused so to do in violation of the terms of the charterparty, and gave notice to the defendant thereof, wherefore the defendant, as h lawfully might, refused further to perform the said charterparty, which are the alleged breaches.

Demurrer and joinder.

Lopes, Q.C. (*Poole* with him) in support of the demurrer, contended that the failure on the part of the plaintiffs to provide the defendant's captain with a cargo from Gollop & Co., in September, was matter for cross action only, and did not so completely frustrate the object of the contract as to justify the defendant's refusal to continue to act under it.

[He cited *Boone* v. *Eyre* (1); *Campbell* v. *Jones* (2); *Ritchie* v. *Atkinson* (3); *Hoare* v. *Rennie* (4); *Withers* v. *Reynolds* (5);

(1) 2 W. Bl. 1312, 1313, n.

(2) 6 T. R. 570.

(3) 10 East, 295 at p. 306.

(4) 5 H. & N. 19; 29 L. J. (Ex.) 73.

(5) 2 B. & Ad. 882.

Weaver v. *Sessions* (1); *Seeger* v. *Duthie* (2); *Tarrabochia* v. *Hickie* (3); *Jonassohn* v. *Young* (4); *Franklin* v. *Miller* (5); *Havelock* v. *Geddes.* (6)]

Cole, Q.C. (*A. Charles* with him), contrà, was not called on.

MARTIN, B. I think the plea is good. The rule with regard to what are or are not conditions precedent is well stated in the notes to *Pordage* v. *Cole* (7), and also in Abbott on Shipping, 11th ed. p. 221, and in Chief Baron Pollock's judgment in *Hoare* v. *Rennie.* (8) Contracts are so various in their terms that it is really impossible to argue from the letter of one to the letter of another. All we can do is to apply the spirit of the law to the facts of each particular case. Now I think the words "condition precedent" unfortunate. The real question, apart from all technical expressions, is, what in each instance is the substance of the contract. And it seems to me that here, under the circumstances alleged, and having reference to the nature of the charterparty, the defendant was entitled to declare the contract at an end. The contract was for the continuous employment of the ship, and the defendant, owing to the plaintiffs' refusal to perform what was, in my judgment, a material part of the bargain, was unable to go on, as he expected, earning his freight. No cross action for damages would have fully compensated him, and that being so, he was justified in his refusal to work any longer under the charterparty. The cases of *Withers* v. *Reynolds* (9), and *Hoare* v. *Rennie* (8), which have been referred to, both seem to me to support the conclusion I have arrived at.

BRAMWELL, B. I am of the same opinion. The contract was for a continuous employment from May, 1871, to March, 1872. But in September, 1871, the plaintiffs in effect said, "We do not mean to go on loading you, the defendant, for a month;" whereupon the defendant said, "Then I shall not go on under the charterparty at all;" and I think he had a right to say so. Suppose the plaintiffs had said they would not load till some distant date—December, for example; but that afterwards they would again proceed with loading, what ought the defendant to do in such a case? He would clearly be bound to find some occupation for his ship; otherwise, when he brought his action for damages the plaintiffs would have good cause to complain. Then is he entitled only to do the best he can with his ship until the time named for loading by the plaintiffs, or is he not entitled to do the best he can once for all? In other words, is he not entitled to treat the charterparty at an end? In my opinion he may take the latter course and thus do what is best for himself, and, at the same time, mitigate as far as possible the damages which the plaintiffs would otherwise be liable to pay for their breach of contract.

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(1) 6 Taunt. 154.

(2) 8 C. B. (N.S.) 45; 30 L. J. (C.P.) 65. 6 Jur. N.S. 1095; 7 L.T. 239.

(3) 1 H. & N. 183; 26 L. J. (Ex.) 26.

(4) 4 B. & S. 296; 32 L. J. (Q.B.) 385.

(5) 4 Ad. & E. 599.

(6) 10 East, 555.

(7) 1 Notes to Wms. Saund. 548.

(8) 5 H. & N. at p. 26.

(9) 2 B. & Ad. 882.

Take another illustration: A ship is chartered out and home, say from London to New York, the charterer to load a cargo at both places. Then he declines to load in London; but still insists that the shipowner is to go to New York for the home cargo. Surely this would not be reasonable. Yet the case seems almost exactly analogous to the present. I think, therefore, the plea is good.

PIGOTT, B. I am of the same opinion. This was no mere partial breach by the plaintiffs, but one which, in my judgment, went to the root of the contract. If we look at the nature of the charterparty it is clear that the defendant expected to earn his freight under it week by week. Short voyages were to be made and paid for in cash. Then, in September, the plaintiffs take a course which certainly causes the defendant to lose his freight under the charterparty for a month, and it is said he should have brought a cross action for damages. That, however, would not have completely compensated him for the loss of the regular and continuous employment he had contracted for under the charterparty. I think, therefore, he was justified in his refusal to work under it any longer.

Judgment for the defendant.

Attorneys for plaintiffs: *Torr & Co., for Carslake & Barham, Bridgwater.*

Attorneys for defendant: *Vizard, Crowder, & Anstie, for Kearsey & Parsons, Stroud.*

[IN THE EXCHEQUER CHAMBER.]

1872
May 14.

1 Ch D 17
2 CPD 408
12 Ch D 49
495, 501
15 Ch D 34
[illegible] D [illegible]
14 BD 58

BAILEY *v.* JOHNSON.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 39, 81—*Annulling Bankruptcy—Property "reverting" to Bankrupt—Mutual Credit—Set-off—Money had and received.*

The defendant having been adjudicated bankrupt on a debtor summons issued by a banking firm of H. & H., a trustee was appointed, who realized the estate, and paid the proceeds into the bank of H. & H. in pursuance of a resolution of creditors. The firm of H. & H. were afterwards adjudicated bankrupts, the sum paid in by the trustee then standing to his credit in their books. Afterwards the order adjudicating the defendant bankrupt was reversed on appeal, and no order was made under s. 81 of the Bankruptcy Act, 1869, as to his property. In an action brought by the plaintiff, as trustee in the bankruptcy of H. & H., against the defendant to recover the amount of his debt to them :—

☞ *Held*, affirming the judgment of the Court below, that the defendant was entitled to set off the amount so paid into the bank by the trustee in his bankruptcy.

Appeal from the decision of the Court of Exchequer, discharging a rule obtained by the plaintiff to enter the verdict for him upon a plea of set-off. (1)

The plaintiff was the trustee in bankruptcy of the banking firm of Harvey & Hudson, and sued for a balance due from the defendant to the firm in March, 1870. The defendant claimed to set off a sum of money paid into the bank in June, 1870, by the trustee in his bankruptcy, the money being the proceeds of his estate, and his bankruptcy having been annulled subsequently to the bank becoming bankrupt.

May 13. *Field, Q.C.* (*Merewether* with him), for the plaintiff, urged the arguments which had been used below, and further contended that the 81st section of the Bankruptcy Act, 1869, which provides that the property of the debtor shall, upon annulment of the adjudication "revert" to him, did not relate to a case like the present, where the order of adjudication was discharged on appeal, but was confined to cases under ss. 28, 84, the only other sections in the Act where the word "annul" is used; that the money paid

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(1) Law Rep. 6 Ex. 279, where the facts and pleadings are fully set out.

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into the bank by Bullard, the trustee, could not, even with the help of the interpretation clause (s. 4), be *property* of the defendant so as to revert to him; that it was originally at law the money of Bullard, in equity the money of the defendant's creditors, and could neither be sued for nor set off by the defendant: *Moore* v. *Pyrke* (1); that the bank could not at any time prior to their bankruptcy have retained or set it off against the defendant's estate; and that at any rate, however it might have been if the annulment of the defendant's bankruptcy had preceded the bankruptcy of the bank, the rights of the parties were fixed at the date of the latter bankruptcy, and could not be varied by subsequent events.

May 14. The Court, without calling upon *Graham* for the defendant, gave judgment as follows:—

COCKBURN, C.J. We are all of opinion that the judgment of the Court of Exchequer is right and ought to be affirmed. In the first place, it is quite clear that s. 81 of the statute applies to the case of a bankruptcy being annulled by whatever means, and is not limited in the manner suggested in the argument. In the next place, I cannot accede to the view that the section operated only on the goods and chattels of the bankrupt taken possession of by the trustee and remaining in specie, and not on cash taken possession of and paid into a banking account, or which forms the proceeds of the sale of goods.

What, then, is the effect of the section upon such property of the bankrupt? There can be no doubt that if the defendant's bankruptcy had been annulled prior to the bankruptcy of Harvey and Hudson, this would have been money standing to the account of the defendant in their books, which would have formed an item of mutual credit, and which he would have been entitled to set off against the debt due to them. The only difficulty arises from the fact that the money was paid into the bank by Bullard, the trustee of the defendant's estate, and that the annulling of the defendant's bankruptcy did not take place till after the bankruptcy of Harvey and Hudson. The question is, whether this prevents the money so paid in from constituting an item of mutual credit between

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(1) 11 East, 52; as to which see *Rodgers* v. *Maw*, 15 M. &W. 444.

2 CPD. 40

the bank and the defendant, and I am of opinion that it has not that effect. The effect of s. 81 is, subject to any bonâ fide disposition lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the Court annulling the bankruptcy may by its order impose, to remit the party whose bankruptcy is set aside to his original situation. Here the Court of Bankruptcy has imposed no condition; the general provision of the section has therefore its full effect, and that effect is to remit the bankrupt, at the moment the decree annulling his bankruptcy is pronounced, to his original powers and rights in respect of his property. We must therefore look at the money as though it were money paid in in his name instead of in the name of Bullard, for having become his by virtue of the annulling of his bankruptcy, it is to be considered as his at the moment when it was paid in; as his, therefore, at the time of the bankruptcy of Harvey and Hudson. I am therefore of opinion that the Court of Exchequer was right in holding that it might be made a matter of set-off.

Blackburn, J. I am of the same opinion. I have never doubted that if the annulment of the defendant's bankruptcy had taken place before the bankruptcy of Harvey and Hudson, the account stated in that bankruptcy must have shewn this money as an item due to the defendant. In fact, however, the annulment took place a few days after the bankruptcy of Harvey and Hudson; and the rule is that the account must be stated as it stands at the time of the bankruptcy. Without determining whether the effect of s. 81 is in every case to go back to the beginning, and to place the bankrupt in the position of having always owned what is by the section to "revert" to him —as to which I do not wish to express any dissent from what the Lord Chief Justice has said, but only to abstain from expressing an opinion—what here appears is, that at the time of Harvey and Hudson's bankruptcy a proceeding was going on which finally ended in annulling the defendant's bankruptcy, and this created at least an inchoate equitable claim of such a kind as ought to be taken into account. The proceedings might have been delayed for a long time, and meanwhile dividends might have been paid which it might work a hardship to disturb; a state of things which perhaps the provisions of s. 81 were intended to meet. But however that might be, the circumstances being such as they are, the difficulty as to disturbing dividends not occurring, and the proceedings to annul the defendant's bankruptcy having shortly afterwards resulted in a successful issue, I think that this sum of money is properly set off against the defendant's debt to the bank.

Keating, J. I agree; and I will only add that not only were the proceedings in the defendant's bankruptcy going on up to and after the bankruptcy of Harvey and Hudson, but Harvey and Hudson had the fullest and most distinct notice of them, they themselves being actually parties litigating with the defendant in those proceedings. The bank therefore received this payment with full notice that it might, as the result of these proceedings, become the property of the defendant; and the subsequent annulling of the defendant's bankruptcy does, at all events to this extent, remit him to his former estate so as to make the payment a matter of set-off.

Mellor, J. I am of the same opinion. In effect this was money paid in by Bullard simply as trustee, known by the bank to be money realized out of the defendant's estate, and as to which it was only a question of time whether it would be decided to belong to the defendant or to Bullard. The effect of the annulment was to declare that the money was the defendant's, and thus to give him a clear right to set it off against the debt due from him to the bank.

Lush, J., concurred.

Brett, J. I am of the same opinion, and I agree with the Lord Chief Justice that it is impossible logically to stop short of giving to the word *revert* in s. 81 the full interpretation which he has placed upon it.

Grove, J., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Sole, Turner, & Turner.*
Attorney for defendant: *Lewis Hand.*

THE LIVER ALKALI COMPANY *v.* JOHNSON.

1872
April 23.

Common Carrier—Fixed Termini—Definite Route—Conveyance of a Single Customer's Goods.

10Ex 363;
4A.&E.44/
1CPD20
1QBD.382

The defendant was a barge-owner, and let out his vessels for the conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure. In an action against him by the plaintiffs for not safely and securely carrying certain goods:—

Held, that he was a common carrier and liable, although the goods were lost without negligence on his part.

Affirmd in Ex Ch LR9Ex338

Action for not safely and securely carrying for the plaintiffs certain salt cake delivered by them to the defendant to be safely carried from Widnes to Liverpool. The defendant denied the receiving of the salt cake on the terms alleged.

It appeared upon the trial before Martin, B., at the Liverpool Summer Assizes, 1871, that the plaintiffs, who carry on business at Liverpool, on the 16th of January, 1871, hired a barge or flat of the defendant, and directed that it should proceed to Widnes, a place situated on the Mersey a few miles higher than Liverpool, and having there loaded a cargo of salt cake bring it to the Liverpool Docks. One of the defendant's flats accordingly went to Widnes, and on the 19th of January started back with the cargo. On her return voyage she struck on a stony bank, and was lost. The master was not guilty of any negligence, the accident being entirely attributable to the foggy weather which prevailed; and the only question, therefore, was, whether the defendant was a "common carrier." Upon this point the following evidence was given:—The defendant is a flat-owner or lighterman, and lets out his vessels to any customer who applies to him; but there is no description of his trade over the door of his premises. He does not cause his flats to ply between any two fixed points; but on each voyage the customer fixes the places both of departure and arrival. A flat is never let by him to more than one person for the same voyage. A separate bargain is made on each occasion, the employer paying a specified rate per ton. Generally

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speaking, there is no contract in writing between the parties, and in the present case there was none. The customer does not, as a rule, select, and the plaintiffs did not select, any particular flat.

A verdict, under these circumstances, was entered for the plaintiffs, with leave to move to enter it for the defendant, if the Court should be of opinion that there was no evidence that the defendant was a common carrier.

A rule was obtained accordingly in Michaelmas Term last.

9 Ex 339

T. James shewed cause. The defendant is a common carrier within the definition in *Gisbourne* v. *Hurst* (1), where it is said that "any one who undertakes to carry the goods of all persons indifferently for hire is a common carrier." This definition is recognized in subsequent authorities: see Bac. Abr. Tit. Carriers (A); Smith's Merc. Law, 8th ed. p. 276; *Coggs* v. *Bernard.* (2) Again, he is the master of a ship, and in the absence of any special contract "hoymen, ferrymen, and masters of ships are common carriers:" *Coggs* v. *Bernard* (2); *Morse* v. *Slue.* (3) He exercises a public employment, and holds himself out as a carrier of goods for hire, not as a casual occupation, but as a regular business; and in Story on Bailments, 8th ed. par. 495, this general undertaking to carry for any one who applies is put as a test of whether a man is a common carrier or not: see also *Ingate* v. *Christie.* (4) There was no special contract by charterparty in this case, nor any bill of lading, and the fact that the flat was wholly let out to the plaintiff is immaterial: Chitty and Temple on Carriers, 149; *Fish* v. *Chapman.* (5) A railway company do not cease to be carriers because a single customer employs a whole truck. Again, the circumstance that the defendant does not ply between fixed termini does not affect the question: Story on Bailments, 8th ed. par. 496, n. 7; *Lyon* v. *Mells.* (6) *Brind* v. *Dale* (7) is no authority to the contrary for there negligence was proved.

C. Russell, Q.C. (*C. P. Butt, Q.C.*, with him), in support of the rule. There was no evidence that the defendant held himself out as a common carrier to the public. Each adventure was made

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(1) 1 Salk. 249.

(2) 2 Ld. Raym. at p. 918; 1 Sm. L. C. 177.

(3) Ventr. 190, 238.

(4) 3 C. & K. 61.

(5) 2 Kelly (Georgia), 349

(6) 5 East, 428.

(7) 8 C. & P. 207.

9 Ex 359

under a separate agreement with one man for one cargo; and the mere fact that there was nothing to shew the defendant ever refused a customer is not sufficient. The present case is really that of a ship let out, as she may be, by a parol charterparty. But to constitute a master of a ship a common carrier he must let out his vessel as a general ship: Story on Bailments, 6th ed. par. 501; Parsons on Contracts, 3rd ed. vol. i. p. 646; *Gage* v. *Tirrell.* (1) Moreover there must not only be a general employment by more than one person, but also fixed termini and a defined route: *Pope* v. *Nickerson.* (2)

[CLEASBY, B., referred to *Maving* v. *Todd* (3), where a wharfinger undertaking to convey goods to a ship from his wharf in his own lighters was held liable as a common carrier.]

KELLY, C.B. This case is by no means free from difficulty, but I feel constrained to assent to the neat and precise argument of Mr. James, and to hold that there was evidence that the defendant was a common carrier. Without going through all the authorities which have been referred to, it is enough to say that we have the clearest authority that "hoymen, ferrymen, and masters of ships who carry goods for hire," are common carriers: *Morse* v. *Slue.* (4) Here the defendant is the master of a ship, and therefore is within this rule, which has been adopted by a long series of cases and text writers. Then also the defendant is within the definition given in Story on Bailments, 8th ed. par. 495, for he exercised, and was known to exercise, a public employment. He carried on his trade by means of numerous vessels, which he let to any one who chose to hire them. Different persons did hire them at different times, and no evidence was given of any refusal on the part of the defendant to allow any applicant to hire.

But now arises the difficulty in the case. The defendant's trade was confined to the conveyance of one person's goods at a time; and no contracts were ever made by him to convey in the same barge, and on the same voyage, the goods of several persons, and it is said that this fact takes away from the defendant the character of a common carrier. No doubt, if each particular voyage had

10 Ex 255

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(1) 9 Allen, 299.
(2) 3 Story, 465.
(3) 1 Stark. N. P. 72.
(4) Ventr. 190, 238.

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Liver Alkali Company v. Johnson.

10 Ex 365

been made under a special contract containing stipulations applicable to that voyage only, the case would have been different. But there is no evidence that this voyage was made under any special agreement which might be equivalent to a charterparty. A charterparty names the vessel hired by it, and contains numerous special terms. Here no vessel was named. There was nothing to fix or earmark any particular barge, and the defendant might have carried the plaintiffs' cargo by any of his vessels. In this respect, therefore, and in the absence of any special terms, the analogy of a charterparty fails; and in my opinion the mere circumstance that the vessel was employed by one person exclusively is not enough to deprive the defendant of his character of common carrier. This rule, therefore, must be discharged.

Martin, Bramwell, and Cleasby, BB., concurred.

Rule discharged.

Attorneys for plaintiffs: *Wright & Venn, for J. & R. Quinn, Liverpool.*

Attorneys for defendant: *Field & Roscoe, for Bateson & Co., Liverpool.*

Followed. *In re* Bailey [1951] 1 Ch. 407

[IN THE EXCHEQUER CHAMBER.]

1872
May 15.

BROOKMAN *v.* SMITH.

Will—Child "born or to be born"—Gift to a Class.

A testator, by a settlement made on the marriage of his daughter, covenanted with trustees to leave an equal child's share of certain freehold property to the use of her husband for his life, or until insolvency, with remainder to her use for life, remainder to the issue of the marriage with specified limitations; and if there should be no issue, or there being issue all should die under twenty-one years of age, then to the use of her heirs "as if she had died sole and unmarried." His will recited the settlement, and the limitations contained in the will substantially coincided with those contained in the settlement. The ultimate limitation was as follows: "And in case every child born, or to be born, shall die under the age of twenty-one years and without leaving issue, to the use of the heirs and assigns of E. A. V. (the daughter) as if she had continued sole and unmarried," with remainder to the testator's right heirs. There were three children born of the marriage. Two died in infancy, and previous to the date of the will; one was alive at that time, and lived until the age of twenty-three. He predeceased the testator, who died in 1849. The husband of E. A. V. became insolvent in the following year. E. A. V. died in 1868. In ejectment by the plaintiff, who filled the double character of heir-at-law of the testator and of E. A. V., against the defendant, an assign of E. A. V.:—

Held, affirming the judgment of the Court below, that the ultimate limitation never took effect, and that the plaintiff was entitled to recover as heir of the testator.

Tarbuck v. *Tarbuck* (4 L. J. (N.S.) Ch. 129) approved.

Error from the decision of the Court of Exchequer in favour of the plaintiff on a special case.

[The facts and arguments are reported at length in Law Rep. 6 Ex. 291.]

The case was argued on the 14th and 15th of May by

Joshua Williams, Q.C. (*T. Atkinson* with him), for the defendant, and by *Waley* (*Pinder* with him) for the plaintiff. The arguments used were similar in substance to those which were urged in the court below. (1)

Cockburn, C.J. Two questions present themselves in this case. The first is, whether the ultimate limitation of this will ever took effect at all; and, secondly, if it did, what is the effect and what is the operation of it? I am of opinion that the ultimate limitation never did take effect, and it will therefore be unnecessary for me to consider the second branch of the case.

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(1) Law Rep. 6 Ex. at pp. 294–297.

It seems to me that the point for decision is comparatively simple and plain. The testator, it appears, was party to marriage articles, entered into upon the intended marriage of his daughter with Mr. Violett; and by the terms of those articles he covenanted to settle by deed or will certain property upon the husband during his life until bankruptcy or insolvency. I pass over the trustees to preserve contingent remainders as merely machinery, and speak of the beneficial estate only. In the event of the bankruptcy or insolvency of the husband, the property was to go to the wife to her separate use for their joint lives, and in the event of his death there was to be a remainder to the wife for life, with remainder to the issue of the marriage. Then comes the clause upon which so much turns, namely, that if there should be no child, or, there being such child or children, if all of them should die under the age of twenty-one years and without any of them leaving lawful issue, then the property was to be to the use of the heirs, executors, and administrators (according to the tenure or quality of the same property) of Elizabeth Ann Brookman "as if she had died sole and unmarried."

The testator having been a party to these articles, and the marriage having been had, he afterwards made his will, and devised in conformity with the provisions of his covenant in the articles; but when he came to the ultimate limitation, inasmuch as a change of circumstances had occurred between the time of the articles and the time of his will, namely, that a child had been born of the marriage, and there still remained the possibility of other children being born, he varied the language of the limitation so as to suit the altered circumstances of the case. The limitation as thus varied is that "in case every child of the said Emmanuel William Violett by Elizabeth Ann, his wife, *born or to be born,* should die under the age of twenty-one years, and without leaving issue," then the therein last-mentioned freehold messuages, &c., should go, remain, and be "to the use of the heirs and assigns of his daughter, the said Elizabeth Ann Violett, as if she had continued sole and unmarried." I think the words "born or to be born" ought to have no more effect attached to them than this, that they are there used as having reference to the particular state of circumstances of there being a child of the marriage then living, as well as a possibility of future children being born.

Now let us look more closely at what this ultimate limitation is. The prior limitations of the will have all either failed or come to an end. The estate of the husband has ceased by reason of his having become insolvent. The wife, who took the estate for life, died in 1868, therefore there was an end to her life estate. There were no children of the marriage who could take at all.

Now, does the ultimate limitation come into effect? In what case is it to come into effect? It is to come into effect in case any child born—"to be born" we may leave out, because no children were afterwards born—shall die under the age of twenty-one years, and without leaving issue. Did that state of things exist? It did not. A child had been born, which child did not die under the age of twenty-one years, but attained that age, and then died in the lifetime of the testator, without leaving issue. What we are asked to do is to take those words, "shall die under the age of twenty-one years without leaving issue," to mean, "shall, having attained the age of twenty-one years, die in the lifetime of the testator," because that is what in point of fact has taken place. It seems to me that we should be making a new will, if we were to introduce an entirely new term to meet a new contingency which is not provided for.

A great deal has been said about the intention of the testator, which, however, must be more or less speculative. It is possible that he may have had some intention as to the particular event which has happened, but I see no evidence of it. I think it far more probable that the case which has since arisen, and to which we are called upon to apply the terms of this will, was not present to the minds either of those who drew the will, or of the testator who executed it. At the time the will was made there was a child living, and in all probability that child might be expected to outlive the testator, his grandfather. There was still the possibility of more children being born of the marriage, and I think in all probability, if I am to speculate upon what was in the mind of the testator, he never contemplated the possibility of his outliving the issue of the marriage then born, or which might afterwards be born. Then a state of things arises which I presume was not contemplated. Are we to force the words of the will, or rather to interpolate new words into it, in order to make it meet this altered and, as I think, in all probability, unforeseen state of things? I think we cannot do that. If there is anything ambiguous in the will, and from the context you can gather the intention of the testator, it is possible that in such a case you may make the language of the remainder of the will meet what you clearly conceive to be the meaning of the man making it. But I see nothing in that which is expressed, and nothing in the rest of the will which would lead me to suppose that it was intended to provide for this contingency, which it would have been so easy to provide for, which a few words would have made perfectly clear, and which, if it had been present to the mind of the testator, he would have provided for. I do not think that we are to make the words of the will embrace that which they do not embrace, and which I do not think, by implication, they were intended to embrace. That would have been my view of the case, independently of the authority of the case of *Tarbuck* v. *Tarbuck* (1), which is directly in point. That decision seems to me to be based on sound principles, nor can I find that it has been anywhere overruled, either directly or indirectly, by decision or by authority, such as I should certainly admit Mr. Jarman to be.

Upon these simple grounds, I think the first proposition for which Mr. Williams has to contend fails, and that being so, it is wholly unnecessary to consider the far more complicated question involved in the second point. Our judgment should be for the plaintiff, and the judgment of the Court of Exchequer ought to be affirmed.

BLACKBURN, J. I am of the same opinion. Upon the view which I take of the matter, it is not necessary to come to any decision upon the second point, as to which I am not by any means prepared to pronounce a judicial opinion; it is on the first ground only that I proceed. I quite agree with Mr. Williams's argument that bequests or devises can only come into operation if the object of the

(1) 4 L. J. (N.S.) Ch. 129.

testator's bounty survives the testator; otherwise they are gone. But I do not think that from that it would at all necessarily follow that the limitations in this will depend on whether the people on whose death they were made to depend died during the testator's life or not. I take it the cases establish this; that if a testator by will left an estate to A., but if A. should die under the age of twenty-one, over to B., then if A. died in the testator's lifetime, but after he had attained the age of twenty-one, though owing to A.'s death during the testator's lifetime he never took the estate and his estate failed, yet, nevertheless, the devise to B. would not take effect, because it was made contingent on A. dying under age, and A. in fact lived beyond that age though he died in the testator's lifetime. In the immense majority of cases I have very little doubt that would be really effectuating the intention of the testator; because generally, where a man makes a will devising to a particular person, and then says, if he dies under age it is to go to another, what he is really thinking of and meaning is the case of the object of his bounty dying under that age, and none other.

There is, however, another class of cases, where a bequest is not to a person named, but to a class—for example, to "children of my nephew or brother," and if those children "die under the age of twenty-one"—leaving out "without issue" as not being material—over; there we encounter quite different considerations. It is very true that none of this class can, any more than a named devisee, take the estate unless they survive the testator; but very often the testator's intention would be this: "I give my estate to those children who at the time of my death are in existence; the devises over are to take effect if the estates given to them fail; but in case those who survive me and take the estate die under twenty-one, then also the other persons named shall be the objects of my bounty in lieu of this class." In the cases on which as far as I could perceive Mr. Williams rested his argument, there were always words which shewed clearly that such were the testator's intentions.

But are we to consider it as the general rule, that unless there is something to negative it, where there is a devise to a class, and a provision that if the class expire or none of them live to be twenty-one, the estate should go over, that proviso includes the case of a member of the class having lived to twenty-one but having predeceased the testator. I think myself, in many cases, such a rule would effectuate the probable intention of the testator; in some cases I can imagine it would defeat it. If it were necessary, for the first time, to determine that question, I should have possibly hesitated; but I cannot but think the case of *Tarbuck* v. *Tarbuck* (1) decides it. Although I quite agree with Mr. Williams that that being a decision of the Master of the Rolls, we, sitting here in the Court of Exchequer Chamber, could decide contrary to it if we saw fit, yet his position is much more difficult than if there was no such decision. If the general question were open, it might be, that after consideration, I might come to the one conclusion or to the other. But when I find that the Master of the Rolls has, as much as thirty-seven years ago, decided one way, and that that decision was not appealed against at the time, and has been, as far as I can find, never attacked judicially, or shaken in any decision, then I must say, unless I see very clear grounds for upsetting that authority, I do not like to shake the rule which it established.

Now, in *Tarbuck* v. *Tarbuck* (1) I find that the argument of Mr. Bickersteth and Mr. Rogers, for the defendant, was similar to Mr. Williams's argument to-day. But it was urged before the Master of the Rolls in vain. After mentioning that the distinction was very nice, he says "I conceive it to be clear that if the brothers had survived the testator the devise to the nephews and nieces could not have taken effect under the circumstances which happened, and it is, I think, established by authority, that the situation of the parties was not altered by their having died before the testator."

It seems to me probable that in the majority of cases this construction would effectuate the intention of the testator, and I think we are bound by *Tarbuck* v. *Tarbuck* (1) to hold that this is the general rule, unless there is something in the words of the will which would shew the contrary. Such words there might be; but in the present case the words which follow, as far as they have any effect at all, tend to fortify the conclusion at which we have arrived, because after having provided for the children the will runs thus: "And in case every child of the said Emmanuel William Violett, by Elizabeth

(1) 4 L. J. (N.S.) Ch. 129.

Ann, his wife, born or to be born, should die under the age of twenty-one years, and without leaving issue," then the freehold messuages, &c., shall go, remain, and be to the use of the heirs and assigns of Mrs. Violett, as if she had continued sole and unmarried. If the words "born and to be born," which are introduced there are to have any effect at all, they are to be read as if the testator had mentioned the grandson, whom he knew to be alive, specifically, and had proceeded to provide for the contingency of his dying under the age of twenty-one. I doubt if it is not attributing too much importance to the words to give them that effect; but, if so, it fortifies the argument against Mr. Williams, and confirms me in my conclusion. The plaintiff, therefore, is, in my judgment, entitled to recover as heir-at-law of the testator.

KEATING, J. I am of the same opinion. Mr. Williams is driven to admit that the case of *Tarbuck* v. *Tarbuck* (1) is in point against the view which he so ably urged; and, further, to admit that that case never has been judicially questioned. He made a faint attempt to shew that the case in the Exchequer of *Doe* v. *Duesbury* (2) had shaken the authority of that case; but I fail to see it. That judgment, therefore, remains; and though we have the power, yet we ought certainly not to overrule it unless we entirely disagree with it. But for the reasons that have been given by my Lord Chief Justice it appears to me that that case was well decided, and accordingly we are bound to uphold it and to confirm the judgment of the Court of Exchequer upon the first point on which they decided this case.

LUSH, J. I am of the same opinion. If I felt disposed to question the case of *Tarbuck* v. *Tarbuck* (1) I should hesitate to do so, considering the eminent judge by whom it was decided, and the length of time that that decision has stood without being questioned in any other court. But so far from being disposed to question it, I entirely agree with it, and I say for myself that if that case had not been decided at all I should have come to the same conclusion upon the words of this will.

Now, we are to put upon the words their ordinary meaning and interpretation, and we are not to supply what the testator has not

(1) 4 L. J. (N.S.) Ch. 129.

(2) 8 M. & W. 514.

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BROOKMAN
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put into the will. And so interpreting them, we find that the contingency upon which the lands are to go over to the heirs of the daughter is that she should have no child, or that every child should die under the age of twenty-one years and without leaving lawful issue. But that contingency did not happen, because one of the children did live to attain twenty-one.

But it is contended that the testator could not have intended this, and I quite agree with Mr. Williams that it is highly probable that if the testator had foreseen this casualty he would have provided for it. It is one of the cases which not unfrequently happens in which the testator does not provide for all the casualties which may happen.

Mr. Williams admits that if Thomas Brookman Violett had survived the testator, though only for an hour, the estate would not have gone over. Yet where would it have gone? Why, to that very quarter where the grandfather intended it should not go. It would then have gone to his father. In truth neither this contingency nor the one which has happened could have occurred to his mind. He seems to have taken it for granted that the child who lived to twenty-one would survive him, and would enjoy the estate. There is no doubt that is the solution, because in the case I have supposed I cannot doubt that if he had had it present to his mind he would have provided for it just as he would have provided, if it had occurred to him, for the casualty of the child who arrived at the age of twenty-one dying without being capable of taking the estate. He has made no provision for either case, and we cannot supply it for him. On these grounds I think the judgment of the Court below should be affirmed.

HANNEN, J. I am of the same opinion. I think this case cannot be distinguished from *Tarbuck* v. *Tarbuck* (1), and that case not having been doubted for so long a period, we ought not now to interfere with it.

BRETT and GROVE, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Pitman & Lane.*

Attorneys for defendant: *Sharp & Turner.*

(1) 4 L. J. (N.S.) Ch. 129.

CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

TRINITY TERM, XXXV VICTORIA.

[IN THE EXCHEQUER CHAMBER.]

BUXTON *v.* RUST.

1872
June 3.

Sale of Goods—Memorandum in Writing—Statute of Frauds (29 *Car.* 2, *c.* 3), s.17.

9 Q B 214
7 Q BD 12

The plaintiff on the 11th of January, 1871, bought of the defendant a parcel of wool, worth more than 10*l.*, "the whole to be cleared in about twenty-one days. A memorandum of the terms of the bargain was handed by the plaintiff to the defendant. None of the wool was delivered, and there was no part payment of the price. On the 8th of February the defendant wrote, "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract." The plaintiff had, in fact, completed his part on the true construction of the contract. On the 9th of February, in answer to the plaintiff's request to see a copy of the contract contained in the memorandum of the 11th of January, the defendant wrote in these terms, enclosing a copy:—"I beg to enclose copy of your letter of the 11th of January."

In an action for non-delivery of the wool:—

Held (affirming the judgment of the Court below), that the letter of the 9th, with its enclosure, taken in connection with that of the 8th, constituted an unambiguous recognition of the existence of the contract and of its terms; and that there was, therefore, a sufficient memorandum in writing signed by the defendant to satisfy the Statute of Frauds, s. 17.

APPEAL from the decision of the Court of Exchequer, discharging a rule to enter a verdict for the defendant. (1)

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(1) Reported, ante, p. 1.

1872

BUXTON
v.
RUST.

Garth, Q.C. (*Shaw* with him), argued for the appellant, the defendant, and in addition to the cases referred to in the Court below (1) cited *Smith* v. *Surman* (2); *Smith* v. *Dixon* (3); *Caregan* v. *Richards* (4); *Jacob* v. *Kirk* (5); Blackburn on Contract of Sale, p. 66.

Powell, Q.C. (*W. G. Harrison* and *R. V. Williams* with him), for the plaintiff, was not called on.

WILLES, J. I am of opinion that the judgment of the Court below was right. The action was brought for the non-delivery of wool, alleged to have been sold to the plaintiff on the 11th of January, 1871; and there is no doubt that a bargain was made on that day. The question is whether it was sufficiently backed by a memorandum in writing, which was necessary under the Statute of Frauds, s. 17, the wool being worth more than 10*l.*, and there having been no delivery either of the whole or in part, and no part payment. Now it is certain there was a contract, and in the first instance, a memorandum of it signed by the plaintiff and assented to by the defendant. The defendant therefore could have treated the contract as binding. For as regarded the chargeability of the plaintiff, the memorandum signed by him and assented to by parol by the defendant, would be sufficient. So it was decided in this court not long since, in a case (6) where we approved the judgment of the Court of Common Pleas in *Smith* v *Neale.* (7)

But the memorandum, though binding on the plaintiff, was not then binding on the defendant because he had not signed it, and the question before us is, whether the letters signed by him, which afterwards passed, constitute a sufficient recognition of the contract by him. On the 7th of February the plaintiff wrote a letter clearly referring to the contract, and shewing a willingness on his part to fulfil it. The defendant answers on the 8th, and in the course of his letter says: "I shall consider the deal off as you have not completed your part of the contract," writing of the deal between them as a contract. Now it appears to me that having regard to the cases of *Shortrede* v. *Cheek* (8) and *Macdonald* v.

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(1) Ante, p. 3.

(2) 9 B. & C. 561.

(3) 3 Jur. 770.

(4) 15 L. T. (N.S.) 252.

(5) 2 Moo. & R. 221.

(6) *Reuss* v. *Picksley*, Law Rep. 1 Ex. 342.

(7) 2 C. B. (N.S.) 67; 26 L. J. (C.P.) 143. 3 Jur NS. 516.

(8) 1 Ad. & E. 57.

Longbottom (1) it might be well worth considering whether evidence would not have been admissible to shew that the contract referred to in the letter of the 8th of February was the bargain made on the 11th of January. In the former case it was held that the words "the promissory note" used in a memorandum of a guarantee might be proved to refer to a certain promissory note made by the defendant's son and payable to the plaintiff. In the latter, evidence was admitted to shew that the words, "your wool," referred to certain particular wool which the plaintiff had under his control at the time of the contract. And here it might, I think, well be contended that the "contract," mentioned in the letter of the 8th, might have been shewn to be the contract of the 11th of January, and then that letter on the principle that verba relata inesse videntur, would itself be sufficient. But we need not decide this point, because we have also the letter of the 9th of February sent by the defendant to the plaintiff, and inclosing a copy "of your letter of the 11th of January." The copy enclosed is in fact a copy of the memorandum of that date; and it may be that this also would be quite enough on the same principle that a printed name on an invoice has been held a sufficient signature. (2) However this may be, I am of opinion that the letters of the defendant of the 8th and 9th of February satisfy the Statute of Frauds. They amount to this. The defendant says: "I did enter into a contract with you on the 11th of January, but I will not perform it for a particular reason, and in order to shew that my construction of the contract is the correct one, I forward you a copy of its terms." This is a sufficient admission, and the fact that it was accompanied by a repudiation of the obligation to perform the contract, does not prevent its being used as an admission. That was decided in the two cases referred to in the Court of Common Pleas of *Bailey* v. *Sweeting* (3) and *Wilkinson* v. *Evans*. (4) The judgment must therefore be affirmed.

BYLES, J. I am of the same opinion as to the letter of the 9th of February, and I base my decision upon that ground.

BLACKBURN, J. I give no opinion as to whether the letters either of the 8th and 9th of February taken singly would constitute a sufficient memorandum to bind the defendant. But I am clearly of opinion that the two taken together are enough. First, we have a contract made on the 11th of January. Then on the 8th of February there is a record of its existence in the defendant's letter where he refers distinctly to the contract, and wishes to escape performance upon the grounds mentioned. Immediately afterwards he encloses a copy of the contract, stating that he sends a copy of "your letter of the 11th of January," and these words must necessarily refer to a copy of the memorandum of the bargain. Taking the two letters together, therefore, I have no doubt that the defendant is bound under the 17th section of the statute

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(1) 1 E. & E. 977, 987; 28 L. J. (Q.B.) 293; 29 L. J. (Q.B.) 256.

(2) *Schneider* v. *Norris*, 2 M. & S. 286.

(3) 9 C. B. (N.S.) 843; 30 L. J. (C.P.) 150.

(4) Law Rep. 1 C. P. 407.

(1) S C 6 Jur N.S. 724, Sil 1102.

I may add with reference to the statement read from Blackburn on the Contract of Sale, p. 66, to the effect that "it seems difficult on principle to see how an admission of the terms of a bargain signed for the express purpose of repudiation can be considered a memorandum to make the contract good," that the point has been clearly settled since the publication of that book by the decisions of the Court of Common Pleas, which have been referred to, and from which I do not see any reason to dissent; the rule they establish is as logical and more convenient than that suggested by myself.

Keating, J., concurred.

Lush, J. I am of the same opinion. If Mr. Garth's construction of the letter of the 8th of February were correct, then, no doubt, neither that nor the letter of the 9th of February would suffice. But I do not think his construction is the true one. The defendant did not say, "There is no contract," but, "there is a contract, which I insist ought to be construed in a particular manner." The letter, therefore, was really an authentication of the contract. That being so, I think there was sufficient evidence of a memorandum in writing.

Brett, J. I think the letter of the 9th of February is alone enough. It appears to me that the case is just as though the plaintiff and defendant had been disputing about the terms of the contract, and that the defendant had said at last, "I will prove my view, because I will send you a copy of the memorandum of the terms of our bargain, and you will then see that I am right;" and thereupon he does enclose a copy in a letter signed by himself. If the plaintiff had been obliged to rely solely on the letter of the 8th I should have had considerable doubt. I do not give any decided opinion upon this point, but it certainly seems to me that the letter does not refer distinctly to the contract of the 11th of January, and moreover it differs in its terms from that contract.

Judgment affirmed.

Attorneys for plaintiff: *Roy & Cartwright.*
Attorney for defendant: *Woodard.*

HEDGES *v.* TAGG.

June 10.

Seduction—Master and Servant—Loss of Service—Service at Period of Seduction and of Confinement.

The plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three days' visit, with her employer's permission, to the plaintiff, her mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother. In an action for her seduction brought by the mother:—

Held (by Kelly, C.B., Martin, Bramwell, and Channell, BB.), that there was no evidence of service at the time of the seduction; and that, therefore, the action was not maintainable.

By Kelly, C.B., and Martin and Bramwell, BB., that the action must also fail on the ground that the confinement did not take place whilst the daughter was in the plaintiff's service.

DECLARATION for seduction of the plaintiff's daughter, then being the servant of the plaintiff, whereby, &c.

Pleas: 1, Not guilty; and 2, a denial that the daughter was the servant of the plaintiff. Issue.

At the trial before Kelly, C.B., at the Guildhall sittings after Easter Term last, it was proved that the seduction took place on the 18th of August, 1870. The daughter was at that time in place as a governess, but was on a three days' visit to her mother, the plaintiff, with her employer's permission. One of the terms of her contract was, that she should be at liberty to return home for her holidays at certain times of the year; but the visit in question was not during the holiday time, but was an exceptional leave of absence granted for a particular purpose, to enable her to go to see some races at Oxford. Whilst she was at home for these three days she assisted in domestic duties. When her confinement took place, she was in the service of another employer, by whom she was dismissed. She then returned home to her mother.

A verdict was returned for the plaintiff for 175*l.*, with leave to move to enter a verdict for the defendant, if the Court should be of opinion that there was no evidence of service; and a rule was obtained accordingly.

Huddleston, Q.C., and *Philbrick*, shewed cause. The action of seduction is founded upon a loss of service; but, according to the authorities, the performance of almost any duties, however light, is evidence of service. Here the daughter was under the plaintiff's roof when seduced, and though only on a visit, made herself useful in the house. Moreover, where the relation of parent and child exists, the law does not require proof of actual service. In *Terry* v. *Hutchinson* (1) constructive service was held sufficient. There the daughter, when seduced, was on her way home from an employer who had dismissed her. Yet the action was held maintainable. This case is different in one respect, because here the service with the employer was not terminated, as it was there. But there is nothing inconsistent in the two services existing together. With regard to the confinement taking place away from home, that is immaterial. It is enough if the relation of master and servant existed at the time of the seduction. *Thompson* v. *Ross* (2) is distinguishable. There the daughter was merely at home accidentally. Here the visit was by her mistress's permission, and during the visit her contract of service with her mistress had, in fact, been suspended, so as to make a new contract possible. In *Manley* v. *Field* (3) the person seduced was the real head of the house, her father being her guest, and on that ground the action failed. [They also cited *Rist* v. *Faux* (4); *Davies* v. *Williams.* (5)]

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(1) Law Rep. 3 Q.B. 599.

(2) 5 H. & N. 16; 29 L. J. (Ex.) 1.

(3) 7 C. B. (N.S.) 96; 29 L. J. (C.P.) 79.

(4) 4 B. & S. 409; 32 L. J. (Q.B.) 383.

(5) 10 Q. B. 725; 14 L. J. (Q.B.) 369.

(2) S C 5 Jur N.S. 1133.

Parry, Serjt., and *J. O. Griffits*, were not called on to support the rule.

KELLY, C.B. I regret to have to come to the conclusion that this rule must be made absolute. It has been truly said the action of seduction is founded on a fiction; but for that fiction there must be some foundation, however slender, in fact. In order to entitle a plaintiff to maintain the action, there must be in some shape or other the relation of master and servant existing between the plaintiff and the person seduced at the time when the seduction takes place. Now, in the cases cited the person seduced had been in the service of persons other than the plaintiff; but at the time of the seduction that relation had ceased. For example, in the case of *Terry* v. *Hutchinson* (1), the daughter of the plaintiff had quitted the service in which she had been; and it was held that the one service having ended, a fresh service with her father immediately began. But here, beyond all doubt, a relation of service existed, when the seduction took place, between the plaintiff's daughter and the lady in whose employment she was engaged. It is true that part of the contract was, that she was to go home for the holidays. But the seduction did not take place during the holidays. If it had, the case might have been different, and we might possibly have been justified in holding that the relation of service was temporarily constituted between the plaintiff and her daughter. Upon this point, however, I give no opinion. For it is quite unnecessary to decide it, as the plaintiff's daughter was only at home by her mistress's permission for a three days' visit, to attend the Oxford races.

Then it is contended that the two services may co-exist. So they may, but not unless by the contract the person employed is to be at the same time under the orders of two different people; and here there is no ground for such a contention.

Moreover, the consequences of the wrongful act did not manifest themselves while the plaintiff's daughter was at home. She was, at the time of her confinement, in a place again; so that, on this ground also, the action fails. There was no loss of service to her mother by reason of her inability to work. A nonsuit must, therefore, be entered.

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(1) Law Rep. 3 Q. B. 599.

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MARTIN, B. I am of the same opinion. The action is not maintainable, in my judgment, on two grounds. First, the plaintiff's daughter was not in her service when the seduction took place; and, secondly, there has been no loss of service, for the daughter was confined whilst in the employment of another person.

BRAMWELL, B. I am entirely of the same opinion. There was no service at the time of the seduction; and, secondly, there was no loss of service to the plaintiff. When the daughter went home it was after her confinement, and she was received by the plaintiff with the knowledge that she had been confined. Any incapability she might then be suffering from was one which, before receiving her back, the plaintiff was aware of; and she has no more right to complain of it, or to bring an action against the seducer on account of it, than a person who employed a man disabled by a wound would have to complain of the wound, or to bring an action against the man who inflicted it. I quite concur with, and adopt, Lord Denman's view in *Davies* v. *Williams* (1), that no action can be brought under such circumstances. We have been pressed with the authority of *Terry* v. *Hutchinson* (2), but that case does not govern this one. The Chief Justice there says: "It must be taken, that when the daughter entered the service she had the intention to return to her father upon its termination;" and that being so, the Court may have well been warranted in assuming that the daughter's service with her parents began from the moment her other engagement terminated. I infer, too, from the report that she had not only the intention to return, but did return in fact, and remained at home until she was delivered.

CHANNELL, B. I also think the rule should be made absolute. But I base my judgment on the first ground only. I cannot see any evidence of service at the time of the seduction. On the second point I give no opinion.

Rule absolute.

Attorneys for plaintiff: *Pownall, Son, Cross, & Knott.*
Attorneys for defendant: *Hurford & Taylor.*

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(1) 10 Q. B. 725; 16 L.J. (Q.B.) 369.

(2) Law Rep. 3 Q. B. 599.

601.

[IN THE EXCHEQUER CHAMBER.]

1872
June 22.

2 P.D. 173

JAMES *v.* THE SOUTH WESTERN RAILWAY COMPANY.

Prohibition—Court of Admiralty—Jurisdiction—Suit for Limitation of Liability—Injunction against Action—Arrest of Ship or Proceeds—Money Equivalent to Proceeds—Payment into Court—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 514—24 *Vict. c.* 10, *s.* 13.

The plaintiff, with his luggage, was a passenger, on the 17th of March, 1870, from London to Guernsey, by the defendants' railway and steamer. On the voyage to Guernsey, the steamer came into collision with another vessel, and sank, and the plaintiff thereby lost his luggage, and sustained personal injury. He then brought an action for damages against the defendants in the Court of Exchequer.

On the 7th and 21st of May, cross causes of damage were instituted in the Court of Admiralty between the defendants and the owners of the other vessel, and 5000*l.* was paid into court by the defendants in lieu of bail. Afterwards, on the 30th of May, the defendants commenced a suit, under 24 Vict. c. 10, s. 13, for limitation of their liability to 15*l.* per ton, being the maximum fixed by the Merchant Shipping Act, 1862, s. 54, submitting to bring that sum into court if they were found to blame in the suits for damage. The owners of the other vessel denied the jurisdiction of the Court to entertain the suit, on the ground that at the time of its institution neither the steamer nor her proceeds were under arrest. On the 4th of June the judge ordered, in general terms, that all actions arising out of the collision should be stayed, the plaintiffs (the now defendants) undertaking to admit liability if the judge should pronounce against them in the damage suits. On the 14th of July the judge pronounced that he had jurisdiction; that the defendants were entitled to limited liability, and were liable in respect of loss or injury to the amount, if at all, of 6376*l.*, being at the rate of 15*l.* per ton on the registered tonnage of the steamer, and ordered that sum to be paid into court, and on the 9th of August the defendants paid it in, and admitted liability unconditionally, having on the 30th of July been held in the damage suits to be solely to blame for the collision.

On the 22nd of November the defendants made an application to the Court of Admiralty for a specific injunction against the plaintiff's action. The plaintiff then commenced proceedings in prohibition:—

Held (affirming the judgment of the Court below), 1st. That prohibition still lies to the Court of Admiralty, although it possesses by statute some of the powers of a superior Court; and, secondly, that the plaintiff was entitled to have the prohibition issued, inasmuch as the jurisdiction given to the Court by 24 Vict. c. 10, s. 13, could only be exercised when "the ship or proceeds thereof" were under arrest, and that in this case neither the ship nor her proceeds, nor anything equivalent to her proceeds, were at any time under arrest.

ERROR from a decision of the Court of Exchequer in favour of the plaintiff, on a demurrer to a plea to a declaration in prohibition. (1)

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(1) Reported, ante, p. 187, where the record is fully set out.

SC in Equity L.R. 8 Ch. 241,

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Sir J. B. Karslake, Q.C. (*C. W. Wood, Q.C.*, and *Cohen* with him) for the defendants. The question of jurisdiction turns principally on the proper construction of 24 Vict. c. 10, s. 13, which enacts that whenever "any ship or the proceeds thereof are under arrest of the High Court of Admiralty," that Court shall have the same powers of entertaining a suit for limitation of liability as are conferred upon the Court of Chancery by s. 514 of the Merchant Shipping Act, 1854. In the present case the ship was lost, and could not herself be under arrest, but before the suit began the defendants had paid 5000*l.* into court in lieu of bail in the damage suit which had been instituted against the *Normandy*, and that sum may be taken as representing the ship: *The Northumbria.* (1) Or, at all events, if this be not so, the full sum of 6376*l.*, which was the maximum of the owners' liability, and which had been brought into court before the injunction of the 22nd of November was applied for, is sufficient to found the jurisdiction of the Court to restrain the present action: *The Normandy.* (2)

[WILLES, J. This matter has been before me at chambers, when the plaintiff's counsel contended that the Court of Admiralty had no jurisdiction, and put his argument shortly thus: "The ship is gone. She is lost, and for all practical purposes is nihil; but 'proceeds' must mean proceeds of something, and ex nihilo nihil fit."]

If the ship had existed and been released, the money paid in in lieu of bail might clearly be treated as representing the res, and here arrest being impossible, and "proceeds" also, in a strict sense, impossible, the conventional value may well be taken as "proceeds."

[BRETT, J. I cannot see how the payment into court in the collision suit can in any possible way be regarded as proceeds of the ship. The money is brought into court under s. 34 of 24 Vict. c. 10, for another purpose altogether, and not to prevent the arrest of the ship: Williams and Bruce's Admiralty Court Practice, pp. 189, 197.]

The money which is paid in to procure the release of a ship, represents the ship. So also does the money paid in to prevent her arrest; and s. 34 of 24 Vict. c. 10, shews that the intention of the legislature was to confer jurisdiction on the Court of Admiralty in all cases where the Court had power to insist upon security being given, although the res itself neither is nor can be under actual arrest.

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(1) Law Rep. 3 A. & E. 24.

(2) Law Rep. 3 A. & E. 152.

If then the "proceeds" of the *Normandy* can be considered as "under arrest," it is no objection to the jurisdiction that before suit there was no unconditional admission of liability. According to *Hill* v. *Audus* (1) there must be an admission at some time before decree, but it need not be made before suit instituted; see *The Amalia* (2); *The Normandy.* (3) The case of *Smith* v. *Brown* (4) is beside the present question altogether. It merely decided that the Court of Admiralty cannot entertain a suit instituted under 9 & 10 Vict. c. 93, by parties entitled to sue under that Act.

Lastly, prohibition will not lie to the Court of Admiralty. That Court is now on the footing of a superior Court: *Place* v. *Potts.* (5) It can finally dispose of the interests of all parties. In the *Mayor of London* v. *Cox* (6) Willes, J., draws a distinction between a local Act affecting the Mayor's Court and recent statutes as to the Court of Admiralty. "In this local Act," he says, "there are neither express words nor necessary implication to produce the prerogative effect of creating a superior Court. . . . Far different was the language used in the public Act of 20 Vict. c. 65, to put the Admiralty Court on the footing of the superior Courts."

[WILLES, J. I do not think this point can be sustained. Some spiritual Courts are superior, and yet prohibition lies to them if they exceed their jurisdiction: *Ricketts* v. *Bodenham.* (7)]

W. G. Harrison, for the plaintiff. The jurisdiction of the Admiralty Court only exists when the ship or her proceeds are under arrest. But here neither when the suit was instituted nor at any other time was either under arrest. The ship was lost, and there could be no arrest either of her or her "proceeds." "Proceeds" means "proceeds of the sale" of the ship, or money paid into court to prevent the sale. The sum paid into court in a collision suit in lieu of bail is not proceeds. It is only paid in to answer the parti-

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(1) 1 K. & J. 263; 24 L. J. (Ch.) 229.

(2) Bro. & Lush. 151; 32 L. J. (P. M. & A.) 191.

(3) Law Rep. 3 A. & E. 152.

(4) Law Rep. 6 Q. B. 729.

(5) 5 H. L. 583. S.C. Ex. 17 Jur. 1168

(6) Law Rep. 2 H. L. at p. 259. S.C. 9.

(7) 4 A. & E. 433.

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cular claim, and not as representing the res itself. In the present case the 5000*l.* paid in in the damage cause against the defendants was not paid in either to release or to prevent the arrest of the res, but, under 24 Vict. c. 10, s. 34, to enable the defendants to continue the principal damage cause, in which they were plaintiffs, against the *Mary*. [He was stopped.]

Sir J. B. Karslake, Q.C., in reply.

Willes, J. Speaking for myself, and apart from judicial duty, I am sorry the cause has arrived at its present stage, and that the plaintiff has not been persuaded to allow the sum which has been paid by the defendants into the Court of Admiralty to be distributed there. However, a judge is bound not to follow his own view as to what is a convenient course. He must measure the rights of the plaintiff, not by "the crooked cord of private discretion, but by the golden mete-wand of the law;" and the question is, whether the plaintiff, against his will, is to be compelled to submit to the jurisdiction of the Court of Admiralty. In considering it we must remember that it is for the defendants to make out that there is some law which authorizes the Court of Admiralty in preventing the plaintiff from pursuing his ordinary remedy. Unless such a law exists, then, as the Admiralty is acting beyond its jurisdiction, prohibition will go; for the Court is one of a limited jurisdiction. I do not call it an inferior Court, but, treating it as a superior Court with a limited jurisdiction, it is subject to prohibition, though superior in name; like many other Courts, nominally superior but still liable to prohibition, their jurisdiction being limited. The defendants rely upon 24 Vict. c. 10, s. 13, giving to the Court of Admiralty, under certain conditions, the same jurisdiction as to limitation suits as is possessed by the Court of Chancery under s. 514 of the Merchant Shipping Act, 1854. This power of limiting liability dates from 7 Geo. 2, s. 15, by which, following a rule which is very general abroad, a shipowner can abandon his vessel, and only be answerable to the extent of the interest which he embarked in the voyage. The law of France upon this point is stated in *Lloyd* v. *Guibert.* (1) And the rule has been embodied in the various Merchant Shipping Acts.

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(1) Law Rep. 1 Q. B. at p. 119.

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With regard to the mode in which the Court of Chancery exercises its jurisdiction, I may note that in *Hill* v. *Audus* (1) the bill does not seem to have been actually dismissed, though the Vice-Chancellor seems to have been ready to dismiss it, because there was no admission of liability. The decision of the Court, however, simply was, that no injunction ought to be granted to restrain the trial of a particular action which had been brought against the plaintiff, and which he sought to restrain. And that is intelligible, because the Court of Chancery would have had no ordinary jurisdiction to try the subject-matter of that action. But this is not equivalent to dismissing the bill because it contained no general admission of liability. Serious consequences might ensue if such a bill were dismissed simply because, in the first instance, there was no admission of liability as to all the persons who might be interested in the matter; seeing that, except through the intervention of the Court of Chancery, there is no mode of arriving at the amount to which liability is to be limited, and no mode of distribution provided.

But whatever may be the jurisdiction of the Court of Chancery is really not material here, because the defendants are bound to shew that jurisdiction existed in the Court of Admiralty. Now it seems that in a collision which occurred between the defendants' vessel *Normandy* and the *Mary*, the *Normandy* went to the bottom, and for all useful purposes ceased to exist. Then proceedings were taken against the defendants, which we must assume to be in personam as well as in rem. True the defendants are a corporation, but I do not stop to consider whether the Court of Admiralty, any more than a court of quarter sessions, has jurisdiction in personam in the case of a corporation, for the plaintiffs in error submitted and paid into court a sum representing the sum they would, if guilty of negligence, be bound to pay to all persons who might have claims against them. The sum did not at first represent the entire amount of pecuniary responsibility, but, assuming that it did, were the conditions of jurisdiction prescribed by 24 Vict. c. 10, s. 13, fulfilled? Was "the ship or the proceeds thereof" under arrest? The ship was certainly not arrested. She was a nonentity, and as much lost as if she had been destroyed by

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(1) 1 K. & J. 263; 24 L. J. (Ch.) 229.

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fire, because she was so deeply buried in the sea that human art could not extricate her, or, at all events, not without an expense not worth incurring. There was no actual arrest, therefore, of the ship, nor was there any constructive arrest, as in the case of *The Northumbria* (1), where bail was put in, not, as I understand, to answer a particular claim, but to represent the whole value of the ship to the extent of the shipowner's liability. If bail was of the first kind, I do not think it could be said that the ship or her proceeds were under arrest. But with regard to the second kind of bail, the judge might not improperly say that the ship—not the proceeds, but the ship itself—was under arrest, just as a person who is out on bail is under arrest, because he is delivered to his bail, as constables who can render him whenever they are tired of the obligation of being his sureties. The analogy is not quite perfect, because the bail here is given, not to give up the ship, but for the whole sum to which the shipowner can by any possibility be by any means liable. However, I do not quarrel with the decision in *The Northumbria.* (1) But it does not govern the present case. The vessel cannot be taken, and the money paid into court is certainly not "under arrest," as her proceeds. The money does not represent the ship, nor was it paid in to save the ship from arrest.

Then can it in any way be considered as the "proceeds thereof"? The passages referred to by my Brother Brett from Williams and Bruce's Admiralty Court Practice, pp. 189, 197, throw much light on this word "proceeds," which is a technical expression, and primâ facie means the proceeds of the sale of the ship when it becomes necessary to resort to sale, in which case the Admiralty Court holds the proceeds as representing the ship; and that primâ facie meaning is strongly confirmed by the argument in *The Neptune* (2), which decided that "materialmen have no lien for supplies furnished in England on the proceeds remaining in the registry of the Court of Admiralty of a ship sold under a decree of that Court for the payment of seamen's wages." In the course of that case the expression "proceeds" was used as meaning proceeds arising from the sale of the ship under the order of the Court. In the reply this construction was insisted

(1) Law Rep. 3 A. & E. 24.

(2) 3 Knapp, 97.

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on by counsel, who referred to *Burton* v. *Snee* (1), where Lord Hardwicke held that there was no lien for repairs (except for those done during the voyage), upon the body of the ship, and, "if," he says, "the body of the ship is not liable, or hypothecated, how can the money arising from the sale be affected or followed, the one being consequential on the other?" And there was no difference, the counsel argued, as to conversion, between the Courts of Admiralty and Chancery, both holding that the proceeds of a thing sold must be subject to the same equities as the thing itself previous to the sale. It will be seen, therefore, that the question of conversion was dealt with. The same line was followed in the delivery of the judgment of the Judicial Committee, where (at p. 114) the Admiralty judge is stated to have rested his opinion upon the principle "that when a ship has been arrested and sold under process from the Court of Admiralty, that Court, after satisfying the immediate object of the sale, holds the balance of the proceeds in usum jus habentium; that the jus habentes are to be ascertained according to the law of the Court in which the fund is administered; that the law of the Court of Admiralty is the civil and maritime law;"—a strange confusion, I may observe, as the civil and maritime law are notoriously diverse and often opposed to each other—and that by that law the materialmen had a lien upon the ship and proceeds. The Judicial Committee reversed this decision, and established the principle already stated. From this case, therefore, and the books we find that the expression "ship, or proceeds thereof," was one already perfectly well understood, and not introduced for the first time into 24 Vict. c. 10, s. 13. It means the ship or the money proceeding from her sale; and if there were any doubt about the meaning, when we find these words joined with the words "under arrest," no room is left for doubt. Here the arrest was impossible both in law and fact; and the circumstances which have happened were not contemplated by the section.

Several other points were raised, but they do not require consideration. To one or two I have referred as bearing, by way of illustration, on the point before us. I express the conclusion I have arrived at with hesitation, because it is to some extent

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(1) 1 Ves. 154.

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inconsistent with the reasons of the Court below. But after fully considering the matter I think that the judgment ought to be affirmed on the ground I have mentioned. I think the Court of Admiralty had no jurisdiction, because there was no arrest of the vessel, and because the money paid into court was in no sense the proceeds of the vessel.

Byles, J. I am of the same opinion. The first question is, whether prohibition now lies to the Court of Admiralty. I find it laid down in Bacon's Abr. Tit. Prohibition, that it formerly lay, and I do not see that there is anything in the modern statutes which have enlarged the jurisdiction of the Court to prevent it still lying. The Admiralty may be, and probably is, entitled to the designation of a "superior" Court, but still its jurisdiction is limited; and the question is, whether on the present occasion that jurisdiction has been exceeded. Now its exercise depends upon whether the "ship or the proceeds thereof" were under arrest. Here the ship was not under arrest. She was at the bottom of the sea. And the "proceeds thereof," mean the proceeds of the sale thereof, or the sum realized by the sale. But here there never can be any sale, nor any sum realized thereby. A sale is impossible. Upon these grounds I concur with my Brother Willes that the judgment of the Court of Exchequer ought to be affirmed.

Blackburn, J. I am of the same opinion. On the first point I have nothing to add. I can see nothing in the recent statutes as to the Court of Admiralty to take away our power of issuing a prohibition. But upon the main question I will say a few words. The jurisdiction claimed here is a particular one, and depends upon the conditions precedent to its exercise enacted by s. 13 of 24 Vict. c. 10. The intention of the legislature was probably to obviate the hardship of a person whose ship, or the proceeds thereof, was under arrest in the Admiralty Court being obliged to go to the Court of Chancery to get protection from suits which had been or might be instituted against him. No doubt the Court of Chancery could, if they thought fit, relieve him and entertain his suit for limitation without insisting upon his paying money into court, or giving security. But the course of practice was the contrary, and therefore the result was that a shipowner might find himself with his ship arrested in one court and under the necessity of paying a sum equal to its value into another. To obviate this inconvenience the jurisdiction of the Court of Chancery was conferred on the Court of Admiralty when the ship, or proceeds thereof, are under arrest; by direct implication there is no jurisdiction, except when those conditions are fulfilled. Here I am of opinion that in no sense could the ship, or the proceeds thereof, be considered under arrest. The defendants, it appears, had instituted a principal damage suit against the *Mary*, and the owners of the *Mary* instituted a cross damage suit against them, and by s. 34 of 24 Vict. c. 10, the Court has power to say that where the ship cannot be arrested the principal suit shall be suspended until security is given to answer the judgment in the cross-suit. The Court exercised this power in the present case, and the defendants did give security by paying 5000*l.* into court. This sum, however, is not the proceeds of the ship, but a collateral sum brought into court, not instead of, or as representing the vessel, but as security so as to enable the defendants to continue to prosecute the principal suit.

With regard to *The Northumbria* (1), I at first thought it rightly decided, but I feel bound to say that Mr. Harrison's argument has shaken my opinion, and I have considerable doubt now whether the learned judge arrived at a correct conclusion. I had thought that when a suit was commenced money paid into court in lieu of bail might well be regarded as "proceeds." But, as Mr. Harrison pointed out, this money is simply paid in by way of security to pay the sum claimed in the particular suit. The difference is very material. Because if the ship were under arrest, or the proceeds of the ship, another claimant might attach them, but he could not attach a sum paid in in lieu of bail, to answer a particular claim. I therefore feel much doubt about that case, but I do not decide the question, because it is not necessary to do so.

As to the case of *Hill* v. *Audus* (2), I feel a difficulty in concurring with what the Vice-Chancellor is reported to have said in the course of his judgment. But I concur with my Brother Willes that the Vice-Chancellor did right. The bill was not, as was sup-

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4/ (1) Law Rep. 3 A. & E. 2~~6~~.

(2) 1 K. & J. 263; 24 L. J. (Ch.) 229.

posed, dismissed; but the injunction applied for, which was to restrain an action which could not have been brought in the Court of Chancery, was properly refused.

KEATING, J. I am of the same opinion. Neither the ship nor the proceeds thereof, were under arrest. I remark that the learned judge of the Admiralty Court himself had doubts as to his jurisdiction, but eventually, looking to the language of the 13th and 34th sections of 24 Vict. c. 10, he decided that he had jurisdiction. Now, where it is sought to give jurisdiction to a Court of limited jurisdiction, which the Admiralty Court—even though it be, as it probably is, in some senses, a "superior" Court—undoubtedly is, the words conferring jurisdiction should be clear and unambiguous; and the words of the 13th section make jurisdiction depend upon the ship or the proceeds thereof being under arrest. Here the ship was certainly not under arrest, and I incline to think that the word "proceeds" means proceeds of the sale of the ship. But I am not prepared to say that where a sale is possible, if the full value of the ship is paid into the registry in order to prevent the sale, that that sum would not be proceeds. But no sum was so paid in here. What was done was the voluntary payment by the defendants of 5000*l.* into court for the purpose of enabling them to continue their suit against the *Mary*. That amount is not in any sense proceeds of the ship. I therefore think the prohibition should go.

LUSH, J. I am of the same opinion. To give the Court of Admiralty jurisdiction the vessel must be under arrest either in specie or by its representative: and I agree, that in the present case, the Court was not in possession of either. The words "proceeds thereof," in s. 10 of 24 Vict. c. 10, clearly mean, in my judgment, "proceeds of the sale" or money resulting from a sale. Here the money was in no sense "proceeds" because it was paid in under s. 34, voluntarily, to enable the defendants to continue their damage suit against the *Mary*. And it was because the ship *Normandy* could not be arrested, that the order was made under s. 34, to bring the money into court to answer the judgment in the cross suit against her owners.

BRETT, J. The question in this case—assuming, as I do, that

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prohibition still lies to the Court of Admiralty—is whether, under the circumstances alleged on this record, the Court of Admiralty had jurisdiction under 24 Vict. c. 10, s. 13, to entertain a suit for limitation of the defendants' liability; a suit such as the Court of Chancery may entertain under the 514th section of the Merchant Shipping Act, 1854. Now the Court of Admiralty has no such original jurisdiction; it has it only by virtue of s. 13 of the first named Act, which enacts that "whenever the ship or vessel, or the proceeds thereof are under arrest of the High Court of Admiralty," that Court shall have jurisdiction, and I am of opinion that this condition must exist at the commencement of the suit. "The ship or the proceeds thereof," are to be "under arrest," and the real point to be decided is, what is the right meaning to put upon the words "proceeds thereof." The phrase, it must be remembered, is used in an Admiralty Court Act, and that being so, we must ask whether in Admiralty proceedings any technical signification belongs to it. And it does appear to have a definite and well understood meaning. In a suit in rem the jurisdiction of the Court depends on the possession of the res, or of the proceeds of the res. Either the res or the proceeds must be "under arrest," that is, the proceeds must be paid into the registry of the court; and they are the proceeds of the sale of the res, or else a sum of money paid in to represent the proceeds and to prevent the sale. Such is the statement of the practice in Williams and Bruce's Admiralty Court Practice, p. 197. The owner may enter a caveat against the warrant to arrest the ship, and for this purpose must file a præcipe, undertaking to enter an appearance in any cause which may be instituted against the property, to give bail or pay money into court; and the rules of practice (Williams and Bruce, Admiralty Court Practice, pp. 189, 197, n.) give the form of præcipe, which in describing the property contains the words "proceeds arising from the sale of, &c.," though, in fact, there was no sale, and the money is paid in to prevent a sale. It would seem, therefore, that in the words "proceeds," something more may be included than the proceeds of an actual sale, and it may be that where the res on which the maritime lien attaches is of greater value than 15*l.* a ton, which is now the maximum of the shipowner's liability, the 15*l.* a ton might be regarded as "proceeds" if the ship was where she could

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be seized. But it is impossible to say that this sum can be the proceeds of the sale, where the ship could not be seized, or where, as here, she has ceased to exist. Still less can the ordinary bail paid in in a damage cause be regarded as "proceeds;" because that is paid in after suit instituted; i.e., after the Court has had possession of the res. Nor can the bail given under s. 34 of 24 Vict. c. 10, be "proceeds" in any sense. It is money paid in, not instead of the res, but "to answer judgment" in the cross cause.

With regard to the decision in *The Northumbria* (1), if the construction placed upon it by my Brother Willes be correct, I think it a sound decision. But if the money paid in there was only in lieu of ordinary bail, then with great deference to the learned judge of the Admiralty Court, I must express great doubt whether his ruling can be supported.

Judgment affirmed.

Attorneys for plaintiff: *Brooksbank & Galland.*

Attorneys for defendants: *Clarkson, Son, & Greenwell, for Crombie.*

June 8.

ESPLEY *v.* WILKES.

Easement—Way—Implied grant of Right of Way.

By a lease, under which the defendant claimed as assignee, S. demised "all that plot of land, bounded on the east and north by newly-made streets" (and on the west and north by other premises of the lessor and his tenants, through which there was no way), "a plan whereof is indorsed on these presents." On the indorsed plan the site of the new streets was shewn, and was marked as "new streets." The lease contained covenants by the lessee to build two houses on the land, and "to kerb the causeways adjoining the said land."

S. afterwards granted to the plaintiff a lease of the land comprised in the site of one of the proposed new streets (which had, in fact, never been made into a street), and the plaintiff inclosed the land, so that the defendant was unable to reach the east side of his premises.

In an action against the defendant for pulling down this obstruction:—

Held, that under the defendant's lease a right of way was granted along the site of the proposed new streets to his premises.

THIS was an action of trespass tried at the last Staffordshire Spring Assizes, before Byles, J. The defendant pleaded a private and a public right of way. On the suggestion of the learned judge the plea of a public right of way was withdrawn (the defendant giving no evidence upon it), and a verdict was entered for the defendant upon the plea of a private right of way, leave being reserved to the plaintiff to enter the verdict for him if the Court should be of opinion that the lease from Lord Stafford, under which the defendant claimed, did not give him a right of way over the land in question, which land had been since leased by Lord Stafford to the plaintiff.

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(1) Law Rep. 3 A. & E. ~~29~~. 41

The facts are fully stated in the judgment of the Court.

May 8. A rule having been obtained by the plaintiff in pursuance of the leave reserved,

A. S. Hill, Q.C., and *Anstie*, shewed cause, and contended that, the defendant's lease describing the land demised as bounded on the east and north by "newly-made streets"—referring to an indorsed plan which shewed "new streets" in those positions—and containing a covenant on the part of the lessee to kerb them, there was an implied grant of a right of way over the new or intended streets to the demised premises; that even if a public street was designed, there was no inconsistency in the public and the private right co-existing if the owner of the private right concurred in the dedication (1); but that it was not necessary to assume such an intention, for the term "street" was equally applicable to a private street: *Wood* v. *Veal* (2); that the lessor having described the premises as bounded by a street, could not (nor could his subsequent lessee) deny that they were bounded by a way which the lessee could use: *Roberts* v. *Karr* (3); *Randall* v. *Hall* (4); and that this was the more clear from the fact (which appeared by the lease) that the lessee would otherwise have no access to his premises.

Matthews, Q.C., and *J. O. Griffits*, supported the rule, and contended that the words of the lease were merely a misdescription; that the word "street" must be taken to mean a public street,

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(1) *Duncan* v. *Louch*, 6 Q. B. 904, at p. 915.

(2) 5 B. & Ald. 454, at p. 457.

(3) 1 Taunt. 495.

(4) 4 De G. & S. 343.

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which excluded the idea of a private way: *Reg.* v. *Chorley* (1); that words merely describing abuttals could not be construed into a grant, even though the abuttal was described as a road: *Harding* v. *Wilson* (2); that, in general, easements were not to be created by mere inference without express words: *Dodd* v. *Burchell* (3); *Rashleigh* v. *South Eastern Ry. Co.* (4); and that the defendant was not without remedy, having a way of necessity to the nearest highway: *Pinnington* v. *Galland.* (5) [They also cited *Whalley* v. *Tompson.* (6)]

Cur. adv. vult.

June 8. The judgment of the Lord Chief Baron and Cleasby, B., was delivered by

KELLY, C.B. This was an action of trespass for throwing down a gate. The only pleas we need consider were, 1, a public right of way over the locus in quo; 2, a private right of way by grant, such grant being contained in a lease of the 1st of November, 1851, for ninety-nine years, from Lord Stafford to one Smith, under whom the defendant claims as assignee of the lease. The premises were described as "all that plot of land situated at Castletown, in the parish of Castlechurch, in the county of Stafford, bounded on the east and north by newly-made streets, on the west by premises demised to Henry Harrod, and on the south by land belonging to the said Lord Stafford; containing on the east side thereof forty-five yards, on the west forty-two yards, and north and south twelve yards; a plan whereof is indorsed on these presents, together with all dwelling-houses, buildings, and erections which, during the term hereby granted, shall be erected on the said plot of land; and all ways, waters, watercourses, lights, easements, and appurtenances to the same premises belonging." The lease contained a covenant by the lessee to build upon the land two dwelling-houses, with all necessary outbuildings and fences, and expend thereon 300*l.* at the least; and also "that the lessee shall and will kerb

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(1) 12 Q. B. 515.

(2) 2 B. & C. 96.

(3) 1 H. & C. 113; 31 L. J. (Ex.) 364.

(4) 10 C. B. 612.

(5) 9 Ex. 1; 22 L. J. (Ex.) 348.

(6) 1 B. & P. 371.

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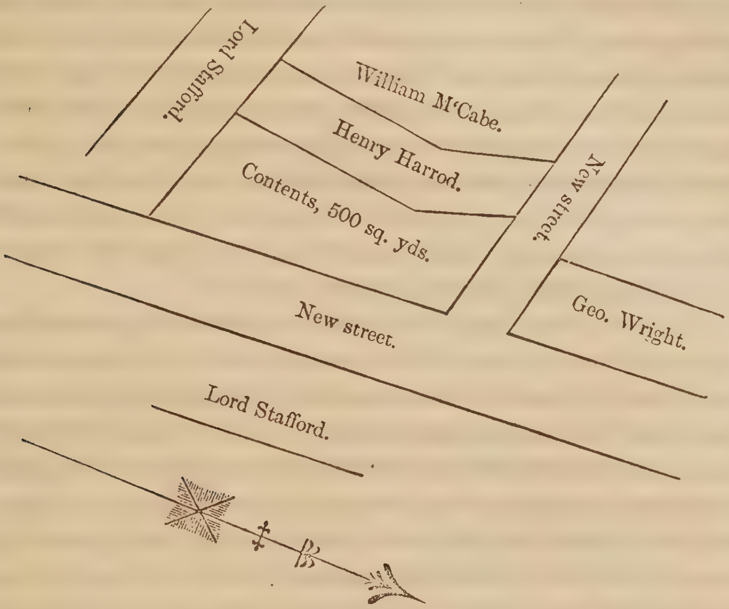
the said causeways adjoining the said land with proper kerbstone." The plan indorsed on the lease is as follows:—



In 1851, when the lease was granted, the strips of land to the north and the east, each delineated and described on the plan as "new street," were, on the east a piece of rough waste ground, and on the north a piece of land indistinctly marked out as a street or intended street, on the north side of which a house was built or begun. There are now public highways to the west and to the north-east of the intended new street upon the north, and communicating with it; but the intended new street to the east, which terminates to the south in a drain, is still rough ground, and for the most part impassable as a road.

At the trial of the cause the plea of a public way was given up, and the learned judge directed a verdict for the defendant upon the plea of the private way, but with leave to the plaintiff to move to enter a verdict for himself upon that plea also. And the question is, whether it was the effect of the lease to grant to the lessee a private way along the north front and the east front of the house, now a public-house called the "Sir Robert Peel," and built pursuant to the covenant, at the north-east corner of the land demised, within a year or a little more of the date of the lease. This house, where it abuts upon the north-east, has the sharp corner cut off, and presents the base of a triangle towards the point at which the prolongation of the two sides would meet to the north-east of the house. It has a front door opening into the street to the north, now called Peel Street, and a yard and gate opening into the intended street to the east, where the defendant had been used to receive cart-loads of coal and other articles, until the way round the corner and along the intended street was obstructed by the gate or fence erected by the plaintiff, and to which the trespass for which the action was brought was committed.

The question we have to determine is, whether a private way was granted by the lease of 1851 together with the plan endorsed upon it, and we are of opinion that such was the effect of the lease. The house was built as contemplated by the lease, abutting on each of the two intended new streets; and it is obvious that, unless a grant was expressed or is to be implied in the lease of a way of some kind along both the north front and the east front of the house to be built, it would be impossible for the lessee to bring materials for the building which he had covenanted to erect upon the land, or to go into or out of his house on the north side or the east side whenever it should be built. And as the land was bounded to the west by land leased to Harrod, upon which a house was also to be built, and on the south by land of the lessors from which there was no approach or access to the land leased, the house so covenanted to be erected, now the "Sir Robert Peel," could not be built at all; and if, or when built, would be absolutely unapproachable and inaccessible. It must, therefore, have been intended by the parties that there should be either a public way, or a private way, or a way of necessity. Now the claim to a public way was properly given up at the trial, inasmuch as it is clear that no public way existed to the east or to the north of the intended house at the time of the lease; and although it may be inferred from the delineation upon the plan of what were called "new streets" to the east and to the north that it was intended by both lessor and lessee, and indeed expressed in the lease, that there were to be streets then made or afterwards to be made, and though it is possible that a covenant might be implied that new streets should there be made, there is nothing in the lease to bind the lessor to make them public streets, or to dedicate them to the public; and it was competent to him to make them into private streets for the use only of the lessees of the houses to be built upon the lands demised. The existence of a public way being thus negatived, it was contended by the learned counsel for the plaintiff that all that could be inferred or deduced from the lease and the facts of the case was, that the lessee had acquired a way of necessity. But a way of necessity exists only where the land conveyed or demised is surrounded by other lands of the grantor, and cannot be approached but by a way over the grantor's land where no way exists, and which thus becomes a way of necessity. But here the lessor, by the grant, has expressly described the land demised as abutting upon strips of land of his own to the north and the east, which he himself in the lease describes as newly-made streets, and which are distinctly delineated upon the plan, and therein called "new streets." The lessor, therefore, is estopped from denying that there are streets which are in fact ways, and which ways run along the north and the east fronts of the houses to be built on the demised lands, including the defendant's house, and of which streets or ways the way claimed in the plea to this action is a part.

We should have thought this point clear upon the obvious and necessary construction of the lease and plan; but the case of *Roberts* v. *Karr* (1) is a direct authority to that effect. There one Pratt granted a piece of ground to Compignè (under whom the defendant claimed), described as abutting east on a new road. It appeared that between a public road and the abutment in question there was a strip of land, the property of the grantor, but upon which no road existed at the time of the grant. The defendant pleaded a public right of way over this strip of land, and it was held that the grantor and those claiming under him were concluded or estopped from denying that there was a road or way over this piece of land; Mansfield, C.J., observing in the judgment delivered, "If you (the lessor) have told me in your lease this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road." And Lawrence, J., observes, "If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?" Here the land is described as abutting upon "newly-made streets," and the case is an authority to shew that the grantor is estopped from denying that the strips of land, his property, are what he describes them to be, that is to say, "streets," which they cannot be unless there be a way through and along them. *Harding* v. *Wilson* (1), cited in argument for the plaintiff, is in effect also an authority for the defendant. There a piece of land was granted "abutting upon an intended way 30 ft. wide;" and the land was underlet, the abutment being described as "upon an intended way," but not mentioning the width of 30 ft. It was held that the under-lessee was entitled to a convenient way, though not of the width of 30 ft.

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(1) 1 Taunt. 495.

But the covenant by the lessee that "he shall and will kerb the causeways adjoining the said land with proper kerbstone" is conclusive to shew that a way was to exist along the north and east fronts of the land demised. The "causeways" are in fact the "newly-made streets" mentioned in the lease and delineated on the plan; and a causeway is a way; and the defendant could not kerb the causeways without treating them and using them as ways.

Upon these grounds we are of opinion that a way, as pleaded, was granted by the lease; that the plea was proved and properly found for the defendant; and that the rule should be discharged. The defendant has contented himself with a claim to a footway It may, however, prevent future litigation to observe that it is clear, upon the facts before us, that he is equally entitled to a carriage way over the locus in quo. (2)

Channell, B. I have not been free from doubt upon this case, but I do not dissent from the conclusion arrived at by my Lord and my Brother Cleasby.

Rule discharged.

Attorneys for plaintiff: *Burton, Yates, & Hart.*

Attorney for defendant: *E. Smith, for Bowen, Stafford.*

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(1) 2 B. & C. 96.

(2) It appears, on referring to the plea, that the way was in fact claimed "on foot and with cattle and carriages."

SMITH *v.* FLETCHER AND OTHERS.

1872
June 12.

8 QB 43
2 App Cas
98.752
12 Ch D 21

Trespass—Duty of Owner of Land—Collecting Water.

One who for his own purposes so manages his land as to collect there in abnormal quantities anything likely to do mischief if it escapes, is, primâ facie, answerable for the damage consequent upon its escape.

The defendants' mines adjoined and communicated with the plaintiff's, and in the surface of the defendants' land were certain hollows and openings, partly caused by and partly made to facilitate the defendants' workings. Across the surface of their land there ran a watercourse. In November, 1871, the banks of the watercourse (which were sufficient for all ordinary occasions) burst in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks water passed into the defendants', and so into the plaintiff's mines. If the land had been in its natural condition the water would have spread itself over the surface, and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines. In an action by the plaintiff to recover the damage he had sustained:—

Held, on the principle of *Fletcher* v. *Rylands* (Law Rep. 3 H. L. 330), that the defendants were liable, although they were not guilty of any personal negligence, and although the accident arose from exceptional causes.

Reversed in Ex Ch LR 9 Ex 64

DECLARATION. 1st count, that the defendants broke and entered a close of the plaintiff called Crossgill, and certain mines thereunder, and flooded them with water, whereby the plaintiff sustained damage, in the manner and to the extent specified in the count.

2nd count: That at the time, &c., the plaintiff was possessed of certain land, and mines thereunder, and the defendants were possessed of certain other land and mines thereunder adjoining to and in communication with the plaintiff's mines, but on a higher level, so that the water introduced into the defendants' mines would by reason of the floor of those mines being impervious to water, and of the "dip" or inclination thereof necessarily run down and pass into the plaintiff's mines, as the defendants well knew; yet the defendants, for the purpose of causing the water to flow and be removed from the surface of their land and from certain hollows in the same caused by former workings into which the water flowed and accumulated, wrongfully made certain holes or openings in the surface of their lands and in the hollows and thereby wrongfully introduced into their mines quantities of water, which water ran

In consequence of part of Ex Ch. cause was referred when verdict was given for plffs, & a rule for a new trial was ultimately discharged by the Ct below & affd by H.L. nom Fletcher v Smith 2 App Cas 781 down the defendants' mines and so into the plaintiff's mines, and flooded them, whereby, &c.

3rd count, similar to the second in its introductory averments, and alleging that the defendants wrongfully and negligently permitted certain holes, which had been made in the surface of their land down to and opening into their mines for the purpose of working the same, to remain open after the holes had ceased to be used for the working of the mines, and by means of these holes quantities of water collected and were introduced into the defendants' mines, and so into the plaintiff's, and flooded the same, whereby, &c.

4th count, similar to the second in its introductory averments, and alleging that the defendants wrongfully and negligently diverted a watercourse flowing through their land without making a sufficient channel for it to flow in and sufficient banks to prevent it from flooding the adjacent lands, and that by reason of this wrongful and negligent conduct of the defendants the watercourse overflowed and burst its banks and flowed over the defendants' lands and into the holes thereon, and thence into the defendants' mines, and so into the plaintiff's, and flooded the same, whereby, &c.

Pleas (inter alia): 1. Not guilty. 2. To 2nd, 3rd, and 4th counts, denial that the water introduced into the defendants' mines necessarily ran down and passed into the plaintiff's mines by reason of the floor of the defendants' mines being impervious, and of the "dip" or inclination thereof. 3. To same: Denial of defendants' knowledge of the things alleged to have been known by them.

Issue.

At the trial, before Lush, J., at the Cumberland Spring Assizes, 1872, the following facts were proved:—

The plaintiff is lessee of iron ore mines in an estate called Crossgill, in the county of Cumberland, and the defendants are lessees of some other mines adjoining the plaintiff's called the Parkside and Goosegreen mines. The "dip" of the strata and deposit of iron ore in all these mines is such that the plaintiff's mines being below those of the defendants, the flow of water would naturally be from the defendants' towards the plaintiff's mines. In parts of the surface of the defendants' land are hollows caused by the subsidence of the ground over spots which have been worked out; and some years ago the defendants, in order to facilitate their working, made a cut from the bottom of one of these hollows to a portion of the iron ore and commenced to quarry it. Running across the defendants' land is a watercourse which in 1865 was diverted into a new, larger, and improved channel.

In November, 1871, there were very heavy rains, and the consequence was that the watercourse overflowed its banks, and quantities of water poured from it into the hollows, and the cut, where already the rains had caused an unusual amount of water to collect, and thence into the defendants' mines. If the land had been in its natural condition, the water would have escaped by degrees, and have done no harm. From the defendants' mines the water escaped into the plaintiff's mines, which he had worked up to the boundary between the properties, and caused damage, for which the plaintiff brought the present action.

The defendants tendered evidence to shew that they had taken every reasonable precaution to guard against ordinary emergencies, and that they had by diverting and improving the watercourse, and otherwise, greatly lessened the chance of water escaping from the surface of their land into their own mines and thence into the plaintiff's; and contended that they were not liable for the consequences of an exceptional flood. They had not been guilty of any personal negligence. The learned judge, however, ruled that having by means of the hollows and the cut suffered water to collect on their land to a greater extent than would have been the case if the surface had been in its normal and unbroken condition, they were absolutely liable for the consequences, and he rejected the evidence offered of the precautions which had been taken to guard against ordinary emergencies. A verdict was under these circumstances entered for the plaintiff, for the damages in the declaration, with leave to move to enter a nonsuit if the Court should be of opinion that there was no evidence of liability. If the verdict were directed to stand, the damages were to be assessed by an arbitrator.

A rule was obtained accordingly calling on the plaintiff to shew cause why a nonsuit should not be entered on the ground that

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there was no evidence of the defendants' liability; or for a new trial, on the ground that the learned judge misdirected the jury by telling them that the defendants were liable under the circumstances for the damage done by water going through the broken ground of the defendants and so on to the mines of the plaintiff, and that the evidence tendered by the defendants was immaterial, and why, in case the Court should think the defendants liable, the damages should not be assessed by an arbitrator upon the principles to be laid down by the Court.

May 31. *Herschell, Q.C.*, and *C. Crompton*, for the plaintiff, shewed cause. There was evidence that the defendants had, by the mode in which they dealt with their land, increased the natural flow of the water into the plaintiff's mine. The case, therefore, is within the principle of *Fletcher* v. *Rylands* (1), where it was held that if an owner of land brings there anything which would not naturally come upon it and which becomes mischievous to another, he is liable in damages, though not guilty of personal negligence. [They also cited *Baird* v. *Williamson* (2); *Ruck* v. *Williams* (3); *Bagnall* v. *London and North Western Ry. Co.* (4); *Williams* v. *Groucott* (5); *Hodgkinson* v. *Ennor.* (6)]

Holker, Q.C., and *Kay, Q.C.*, in support of the rule. *Fletcher* v. *Rylands* (1) and the former decisions on which that was based, are inapplicable, because here the accident was caused by an extraordinary emergency against which the defendants were not bound to provide. They may have brought on their land more water than would have come there in its normal state; but they could have proved that they had provided against all ordinary emergencies, and in fact by improving the watercourse lessened the risk of danger. The judge was wrong in refusing this evidence, and in holding that the defendants, having increased the amount of water on their land, were bound to guard against mischief in all events. In *Williams* v. *Groucott* (5) a shaft was sunk, and the mode of working adopted by the defendant there was in itself im-

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(1) Law Rep. 3 H. L. 330; Law Rep. 1 Ex. 265; 3 H. & C. 774.

(2) 15 C. B. (N.S.) 375.

(3) 3 H. & N. 308.

(4) 7 H. & N. 423; 1 H. & C. 544 31 L. J. (Ex.) 121, 480. 8 Jur. N.S. 16

(5) 4 B. & S. 149.

(6) 4 B. & S. 229. 9 Jur. N.S. 1152

(1) S.C. 12 Jur. N.S. 603. 11 Jur. N.S. 714

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prudent and dangerous. Here there was no suggestion of actual negligence. *Hodgkinson* v. *Ennor* (1) was decided upon considerations applicable only to riparian proprietors. [They also cited *Smith* v. *Kenrick* (2); *Scotch Mining Co.* v. *Lead Mills Co.* (3); Gale on Easements, 4th ed. p. 404.]

Cur. adv. vult.

June 12. The judgment of the Court (Martin, Bramwell, and Channell, BB.) was delivered by

Bramwell, B. I am of opinion that our judgment must be for the plaintiff. I cannot distinguish this case from *Fletcher* v. *Rylands.* (4) The defendants have for their own purposes caused water to come to collect and stay in a place where by their operations also, it would sink, as it has sunk, into their mine, and then get, as it has got, into the plaintiff's and damage it. The defendants have artificially caused foreign water to get into the plaintiffs' mine, water which did not arise there nor get there by mere natural causes, water which got there not by the defendants not preventing, but by their causing it. I have no desire to quote my own judgment in *Fletcher* v. *Rylands* (4), but I abide by what I there said. It seems applicable to this case, and I do not know how to mend it. But I will examine this case more particularly.

The defendants are the owners of land in which there is or was iron ore; a portion of the ore came to the surface, a portion was subterranean. The latter was got by mining, the former by quarrying. The quarrying caused a large hollow of various depths. Whether this hollow ever communicated with the underground works I know not. The underground works, by removing the support of the surface, caused, as I understand, subsidence, and so cracked the surface of the hollow, and made fissures down which water could escape, as I understand. Be this as it may, the result of the defendants' operations was a hollow, to the lowest part or parts of which water, if it got into the hollow, would flow, and which lowest part or parts was and were not watertight. A flood came; a brook (I omit here to notice its diversion by the defendants) overflowed, and instead of the water passing over the surface and getting away as it would have done, it got into the hollow so made by the defendants, and, of course, could not escape, except through the fissures or cracks, and, of course, did escape through them into the defendants' mine, and thence to the plaintiff's. How does this differ from *Fletcher* v. *Rylands?* (1) The defendants here did not indeed make a reservoir. But suppose they had made the hollow originally excavated for other purposes into a reservoir, or fish pond or ornamental water, would the fact that it was originally for another purpose than holding water have made any difference? That cannot be. But it is said they did not bring the water there as in *Fletcher* v. *Rylands.* (1) Nor did they in one sense; but in another they did. They so dealt with the soil that if a flood came the water, instead of spreading of itself over the surface and getting away to the proper watercourses innocuously, collected and stopped in the hollow with no outlet but the fissures and cracks. Suppose the rain, without a flood, falling in this hollow had made, as it will, pools in the lower part, and the water so collected had gone through the fissures and cracks into the mine instead of being left on the surface to evaporate and percolate naturally, and that the damage to the plaintiff had been sensible, could the defendants say they were not liable because they did not cause the rain to fall?

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(1) 4 B. & S. 229. (2) 7 C. B. 515. (3) 34 L. T. 39.
(4) Law Rep. 3 H. L. 330; Law Rep. 1 Ex. 265; 3 H. & C. 774. 12 Jur N.S. 603
11 Jur N.S. 714

So again, can they say they did not cause this flood water to collect where it did with no outlet except to the mines, because it came there by the attraction of gravitation? It is said the flood was extraordinary, and they could not foresee it. I repeat my remark that that may take away moral blame from them, but how does it affect their legal responsibility? If for their own purposes they had diverted this flood into the hollow, when it came, then, though not knowing what would happen, it is clear they would be liable. Why are they not if it comes, because it must come, from natural causes?

It is to be observed the mischief the defendants have done is not merely in causing the water to come, but to stay, and stay in a leaky hollow. If it had come and could have got away, as before the hollow existed, there would have been no harm; nor would there have been if the hollow had been watertight. Lord Cairns says in *Fletcher* v. *Rylands* (1), "The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of the land be used; and if in what I term the natural user of that land there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril." Surely in this case the accumulation of water without its natural outlet is not by the natural use of the land, and it is not by operation of the laws of nature alone that water has passed into the plaintiff's mine. And though what the defendants have done was not for the purpose, yet it had the result of introducing water in quantities and in a manner not the result of any work or operation on or under the land. So Lord Cranworth, in the same case, speaking of *Smith* v. *Kenrick* (2), with which I wholly agree, says (at p. 341): "The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata." The water was only left by the defendant to flow in its natural course, and at p. 342 he says: "If water naturally rising in the defendant's land had by percolation found its way down to the plaintiff's mine through the old workings, that would not have afforded any ground of complaint." If it should be said this water naturally came to the defendants' land, the answer is, it did not naturally come to the lowest parts of the hollow, and it did not naturally stay there, except by reason of the defendants having artificially made that hollow, and did not naturally escape except by the hollow not being watertight.

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(1) Law Rep. 3 H. L. 330; Law Rep. 1 Ex. 265; 3 H. & C. 774.

12 Jur NS 603. 11 Jur NS 714

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(1) Law Rep. 3 H. L. at p. 338.

(2) 7 C. B. 515.

If the similitude to responsibility for a dangerous animal is looked for in this case it will be found the defendants did not indeed keep, but they created one for their own purposes and let it go loose. It is as though they had bred a savage animal and turned it out on the world.

I have hitherto dealt with the case without mentioning the fact that the defendants had diverted the brook, and that the water escaped from the artificial channel they had made and so got to the hollow, and thence to the mines. Such are the facts, and the defendants, therefore, for their own purposes, brought the water to the place whence it escaped and did the mischief. They brought it there without providing the means of its getting away without hurt. This undoubtedly makes a case against them that calls for an answer. The answer they make is this:—They say "we brought the water there, indeed, and did not provide sufficient outlet for it, but had we not altered the original course of the stream it would have escaped in greater quantities and done more mischief." My Brother Lush held this to be no answer, and I agree with him. It may seem strange that if the results of acts as a whole have done no harm to a person he should nevertheless have a right to complain of the results of one-half of those acts. But the plaintiff has a right to say, "You have caused this; had you left nature to itself worse might indeed have happened, but that would have been my misfortune; perhaps it would not have happened; perhaps we could have guarded against it. I decline to discuss this. You may indeed have done me good; if so, you should have done more good." What in effect is this answer of the defendants but a kind of set-off, i.e., a set-off of the good they have done against the mischief they did at the same time? Can it be an answer that the brook, unless diverted, would have overflowed in greater quantity and done more mischief in the same place? Obviously not. Yet, how does that differ from the present case? Or suppose the diversion flooded plaintiff's mine A, and the original brook would have flooded plaintiff's mine B. In fact the defendants have done that which has injured the plaintiff, and of that he is entitled to complain, and they have no right to set off a benefit which they were not asked by the plaintiff to confer on him. On this ground also I think the ruling complained of is right; but of course the whole case must be taken together, and on that whole case my judgment is for the plaintiff. In this my Brothers Martin and Channell concur. The rule will therefore be discharged.

We are to say on what principle the arbitrator is to assess the damages. It is impossible to lay that down with precision. He may well take into account the shortness of the plaintiff's term if by reason of that the plaintiff will lose some of the mineral. He may well also take that into account in favour of the defendants if the term is so short that it would not pay the plaintiff to remove the water, as otherwise he might receive the damages and leave the defendants subject to an action by the lessors or plaintiff's reversioners. So also he may see if the mine is worth unwatering. If any more precise direction is required of us the matter must be mentioned particularly to us.

Rule discharged.

Attorneys for plaintiff: *Helder & Kirkbank.*

Attorneys for defendants: *Gregory, Rowcliffes, & Co., for Musgrave, Whitehaven.*

CLARKE v. WILLOTT.

June 21.

24 Ch D 16

Vendor and Purchaser—Title—Voluntary Conveyance—27 Eliz. c. 4.

The defendant having executed a voluntary conveyance, agreed to sell the property comprised in it to the plaintiff, who paid a deposit. The plaintiff refused to accept the title, and sued for the deposit:—

Held, that the defendant could not make a good title, first, because the voluntary conveyance might have since been confirmed by a consideration, and its invalidity therefore depended on a doubtful state of facts; and, secondly, because the defendant could not compel the plaintiff to concur in defeating the previous conveyance, and making a good title to himself; and that the plaintiff was therefore entitled to recover the deposit.

SPECIAL CASE, stated in an action brought to recover a deposit of 12*l.*, paid by the plaintiff to the defendant, upon the defendant's entering into a contract for the sale to him of certain lands.

The contract was made on the 22nd of December, 1870; and on the 11th of April, 1871, an abstract of title was delivered, by which it appeared that in 1839 the defendant, being owner in fee simple of the lands now sold (and which included both freehold and copyhold) and being then unmarried, executed deeds of lease and release, by which she conveyed the freehold to certain trustees on trust for sale, and to invest the proceeds, and to pay the income arising therefrom, and the rents until sale, to herself for her life, and after her death to divide the principal among her children (if any), and if no child, then to divide the principal among three persons therein named; and she also covenanted to surrender the copyholds to and upon the same uses and trusts. The deed contained a power to the defendant to appoint 2000*l*. out of the trust moneys in favour of any husband she might marry, or of any other person.

No consideration appeared on the face of the deed, and the defendant had never married.

Some informal communication took place between the plaintiff's attorney and the defendant's attorney, in the course of which it was stated that the conveyance was a voluntary one; but no evidence was furnished of this, or of any of the other facts hereinafter mentioned. On the 2nd of May, the plaintiff's attorney delivered requisitions, in which it was objected that no title was shewn in the defendant; and by a letter of the same date he requested a return of the deposit. This letter was not replied to.

The special case contained statements to the following effect:—

No surrender of the copyhold was ever made. The two trustees and the three beneficiaries named in the deed were dead at the time of making the agreement for sale, and their representatives did not concur in the sale.

There was no evidence of any consideration for the deed, nor of any appointment under it, nor of any conveyance of or incumbrance upon the property by the trustees; and the defendant bonâ fide believed and asserted that there was no such consideration, appointment, conveyance, or incumbrance.

The time for completing the purchase had expired.

The question for the opinion of the Court was, whether the defendant had deduced a good title.

June 20. *C. S. C. Bowen*, for the plaintiff. First, a purchaser is not bound at law to take a title which equity would not compel him to take: Dart's V. and P., vol. ii. p. 892; and especially he is not bound to take a title which depends for its validity upon a doubtful state of facts: *Simmons* v. *Heseltine.* (1) But here there is no reasonable evidence that the defendant can make him a good title, notwithstanding he is a purchaser for value; for, in the first place, there may have been a consideration for the deed though not expressed in it, of which parol evidence may be given: *Harman* v. *Richards* (2); in the second place, the deed may have been established by a consideration given since its execution: *Parr* v. *Eliason* (3); *Prodgers* v. *Langham.* (4) These are chances which the purchaser is not bound to take: Sug. V. and P. 14th ed. p. 720.

Secondly, assuming that as a purchaser for value he would be protected by 27 Eliz. c. 4, still the vendor cannot insist upon his taking the title. A voluntary grantor cannot allege his own fraud for the purpose of defeating his own grant, and on this ground equity would refuse to enforce specific performance at his suit: *Smith* v. *Garland* (5); *Johnson* v. *Legard.* (6) In fact, he has himself no title, and cannot insist upon the purchaser's helping him to make one. The only case in which a purchaser has been compelled to complete at the suit of a vendor who has made a voluntary conveyance is *Peter* v. *Nicolls* (7); but there the purchaser had himself occupied the premises long enough to acquire a title under the Statute of Limitations.

[He also cited *Doe* d. *Newman* v. *Rusham* (8) and *Goodright* d. *Humphreys* v. *Moses.* (9)]

Cave, for the defendant. It is true that equity will not aid a voluntary grantor to defeat his own conveyance, but neither will it restrain him from doing so; it simply stands neutral: *Pulvertoft* v. *Pulvertoft.* (10) The question is therefore a merely legal one, and at law, if the vendor can, in fact, make a good title to the purchaser, the mere suggestion of a doubt will not deprive him of

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(1) 5 C. B. (N.S.) 571; 28 L. J. (C.P.) 129.

(2) 10 Hare, 81; 22 L. J. (Ch.) 1066.

(3) 1 East, 92, at p. 95.

(4) 1 Sid. 133.

(5) 2 Mer. 123.

(6) T. & R. 281.

(7) Law Rep. 11 Eq. 391.

(8) 17 Q. B. 723; 21 L. J. (Q.B.) 139.

(9) 2 W. Bl. 1019.

(10) 18 Ves. 84.

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the right to have the purchase completed: *Stevens* v. *Austen.* (1) The only question therefore is, will the purchaser by taking a conveyance from the vendor get a good title? and the test of that is, will he be able to force the title on a purchaser from him? That he will is clear from *Butterfield* v. *Heath.* (2) The vendor can therefore make a good title, and that the estate is not in her is of no consequence; all she undertakes is that she will vest the estate in the purchaser, and that she is able to do. The abstract only shews where the estate is; who are the necessary conveying parties is matter, not of title, but of conveyance; the abstract is therefore perfect, and by force of the statute of 27 Eliz. c. 4, the defendant is the only necessary conveying party. If, therefore, the plaintiff is, as he must allege that he is, ready and willing to complete and to take a conveyance of the property, the defendant is equally ready and willing and able to give it, and the plaintiff is not entitled to rescind and claim his deposit. The principle laid down in *Peter* v. *Nicolls* (3) is that where the purchaser is ready and willing to complete, this objection cannot avail.

Bowen, in reply.

Cur. adv. vult.

June 21. The following judgments were delivered.

BRAMWELL, B. I come to the conclusion that this was a voluntary settlement; but I am nevertheless of opinion that our judgment must be for the plaintiff.

First, I think the plaintiff's preliminary point is a good one. The abstract shewed no title in the defendant. That objection being taken, the defendant's attorney states that it was a voluntary conveyance; but the plaintiff was still entitled to require reasonable evidence of the fact. This requisition was made on the 2nd of May, but no notice is taken of that letter by the defendant's attorney. Now, assuming this to have been in fact a voluntary conveyance, and that the plaintiff was a purchaser for value, what is there to shew to his satisfaction that it was originally and had always since continued to be a voluntary conveyance? There is nothing.

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(1) 3 E. & E. 685; 30 L. J. (Q.B.) 212. 7 Jur. N.S. 813.

(2) 15 Bea. 408; 22 L. J. (Ch.) 270.

(3) Law Rep. 11 Eq. 391.

But then, on the more substantial point, I also think the plaintiff entitled to succeed. Not on the ground that the defendant cannot, as it is said, allege her own turpitude; for I cannot think that, because thirty years ago, in order to guard against her own weakness or improvidence, she made a settlement in favour of herself and of other persons who are now dead, she is alleging any moral turpitude in saying that that deed was void under the statute. But I decide the case (on this branch of it) on the ground that she is asking the plaintiff to take a title which she has not got, and which without the plaintiff's assistance she cannot make; she is in fact asking the plaintiff to help her to make a title. I cannot think that she is entitled to do this. It may be true that this is a voluntary conveyance, and that the purchaser would have had a good title if he had taken the conveyance to himself, but how is he bound to make it good by his own act in taking it? It ought to be good at the time when he is required to take it. It is possible that a purchaser might find himself heir or devisee of the voluntary grantee; thus the property would come to him for nothing. Would he be bound in such a case to pay for the estate he would otherwise get for nothing? But if he is not bound in one case he cannot be bound in any. The cases in equity, so far as they go, are to the same effect, though the reasoning seems peculiar. If the vendor has a good title I do not see why equity should not assist him to compel the purchaser to take it; if he has not, no further argument seems necessary. At common law, at any rate, the vendor cannot succeed because he has no title, and therefore cannot make one. On these grounds I think the plaintiff is entitled to judgment.

CLEASBY, B. I am of the same opinion. It must be borne in mind that a conveyance, though voluntary upon the face of it, and at first void as against a purchaser for consideration, may yet become valid by force of subsequent events. This was held in *Prodgers* v. *Langham* (1), a case which Lord Eldon said in *George* v. *Milbanke* (2) had long been considered good law, and Lord Kenyon spoke of it in *Parr* v. *Eliason* (3) as a leading authority: see also per Lord Eldon in *Johnson* v. *Legard.* (4)

(1) 1 Sid. 133.
(2) 9 Ves. at p. 193.
(3) 1 East, at p. 95.
(4) T. & R. at p. 294.

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This rule, it is obvious, introduces into the consideration of a title with a voluntary settlement forming part of it, an element of uncertainty and doubt as to the effect of all which has taken place in the course perhaps of several years, and which may or may not have given validity to the voluntary conveyance.

And this has been considered a good reason why the buyer is not bound to take such a title. He has no means of ascertaining conclusively the real facts, and might be purchasing a lawsuit in which the question would be whether the settlement had become effectual, or continued merely voluntary and so void against a purchaser. The question has never arisen in the present form, viz., the case of the buyer seeking to recover back his deposit on the ground that a sufficient title is not made out by the vendor. But it is well established that the vendor in such a case does not make out a title so as to call upon the purchaser to accept it. Equity will neither interfere to give validity to the settlement by restraining the settlor from selling; nor will it interfere to set aside the settlement by compelling a purchaser to accept the title: *Pulvertoft* v. *Pulvertoft* (1); *Smith* v. *Garland.* (2) At the instance of the purchaser it will lend its assistance, but not against him.

There seem to be two valid objections:—1. The title involves facts the uncertainty of which entitles the purchaser to reject. 2. The vendor must make a good title himself, and has no right whatever to insist upon the purchaser making the title a good one by accepting it, and so by his act making the voluntary deed void.

Judgment for the plaintiff.

Attorneys for plaintiff: *Duncan & Murton.*
Attorneys for defendant: *Purkis & Perry.*

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(1) 18 Ves. 84.

(2) 2 Mer. 123, at p. 127.

BROWN *v.* MULLER.

1872
June 8.

Contract to Deliver Goods at a future Time—Delivery in Monthly Parcels—Measure of Damages.

The plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, October, and November, 1871. In August, 1871, the defendant gave notice to the plaintiff that he did not intend to deliver any iron. In December, the plaintiff commenced an action for non-delivery, and claimed as damages the difference on the 30th of November between the contract and market prices of the iron :—

Held, that the proper measure of damages was the sum of the differences between the contract and market prices of one-third of 500 tons on the 30th of September, the 31st of October, and the 30th of November, respectively.

8 CP 173-4
176-7-8-9
182-4
8 Ex 813.
10 Ex 197
10 QB 325
4 CPD 24
7 QBD 91 —
102

THIS was an action for non-delivery of iron.

At the trial before Lush, J., at the Liverpool Spring Assizes, 1872, it was proved that on the 21st of August, 1871, the plaintiff bought of the defendant 500 tons of iron of a specified quality, " delivery in about equal monthly quantities over September, October, and November." A misunderstanding having arisen about the exact quality of iron to be supplied—whether it was to be " forge " or " foundry " of a particular number—the defendant, on the 24th of August, wrote to the plaintiff to request him " to consider the matter off," and on the 5th of September informed him in another letter that he regarded the contract as cancelled, and had expunged the order from his books.

The plaintiff did not reply to these letters, and on the 25th of October demanded delivery of 200 tons " as per contract." The defendant declined to deliver, alleging there had never been a contract. On the 4th of December the plaintiff wrote, stating that he had bought at the end of November 500 tons of iron against the quantity the defendant had refused to deliver. This action was brought to recover 237*l.* 10*l.*, being the difference between the contract price and that at which the plaintiff had bought. If the plaintiff had bought in when the defendant repudiated the contract the difference would have been 25*l.*; if he had bought in one-third at the end of each of the three months the sum of differences would have amounted to 109*l.* 4*s.*

A verdict was entered for the plaintiff for the full amount, with

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leave to the defendant to move to reduce the damages to such sum as the Court should direct.

A rule was obtained accordingly on the ground that the damages ought to be assessed with regard to the difference between the two prices at the time when the defendant gave notice to the plaintiff of his intention not to deliver any iron, or with regard to the difference on the 30th of September. (1)

June 7, 8. *Aspinall, Q.C.*, and *Shield*, shewed cause. The plaintiff is entitled to the whole difference between the contract price and the price at the end of November. It is true that he might, if he had pleased, have treated the defendant's repudiation as a breach of contract, and then maintained an action on the principle of *Hochster* v. *De la Tour* (2), and *Frost* v. *Knight* (3), but he may wait until the last day on which the defendant might have delivered: *Phillpotts* v. *Evans.* (4)

8 CP 174

[BRAMWELL, B. Quite apart from *Hochster* v. *De la Tour* (2), there was an absolute breach at the end of September. Ought not the plaintiff, either when the defendant repudiated or at the end of the first month, to have endeavoured to provide himself with another contract?]

He has an option. He is not bound to make a new contract which may or may not turn out advantageous to him.

[KELLY, C.B. The defendant was to deliver in about equal quantities in each month. It seems to me that the true measure of damages is the sum of the differences at the end of each month between the contract and market prices of one-third of the 500 tons.]

According to *Leigh* v. *Paterson* (5) the last day of the whole period is the proper date when goods are to be delivered between specified days.

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(1) Leave was also reserved to enter a nonsuit, on the ground that there was no binding contract between the parties, and the rule obtained was to enter a nonsuit as well as to reduce the damages; but it is unnecessary to report the arguments or judgments upon the first point. The Court discharged the rule so far as it related to the entry of a nonsuit, being of opinion that there was a contract to deliver 500 tons "foundry" iron disclosed upon the correspondence.

(2) 2 E. & B. 678; 22 L. J. (Q.B.) 455. 17 Jur 972

(3) Ante, p. 111.

(4) 5 M. & W. 475.

(5) 8 Taunt. 540.

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[MARTIN, B., referred to *Boorman* v. *Nash* (1), and *Josling* v. *Irvine* (2), as supporting the view suggested by Kelly, C.B.]

Herschell, Q.C., in support of the rule. The verdict is clearly entered for too much. The plaintiff cannot lie by until the close of the whole period. *Leigh* v. *Paterson* (3) is not an authority for that proposition. That case might have applied if the defendant might have delivered the whole 500 tons on the last day of November, but it has no application where the goods are to be delivered in parcels. The proper date for fixing the damage on such a contract is either on the day of repudiation or, at all events, on the day when the contract is irrevocably broken: i.e., in this case either on the 24th of August or the 30th of September. The plaintiff ought to have entered into a new contract to the same effect as the broken one. Or, again, if neither of these days be accepted, the plaintiff at the outside is only entitled to the aggregate of the differences at the end of each of the three months.

KELLY, C.B. I should not have felt much doubt as to what should be the measure of damages in this case, but for the hesitation expressed during the argument by my Brother Martin; a hesitation which, however, I understand now to be removed. The defendant undertook in this case to deliver 500 tons of iron during the months of September, October, and November, 1871, in about equal portions; that is at the rate of about 166 tons in each month; and he has failed to deliver altogether. Now the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed. This being the general principle of assessment, we find that the defendant delivered no iron in September, and on the 30th of that month, I think, the plaintiff was entitled to receive, as damages, the difference on that day between the contract and market price of 166 tons. No other satisfactory principle can be suggested. The plaintiff might have resold this amount of iron to a sub-purchaser, and to satisfy this sub-contract might have bought at the then market price; or else must have paid the sub-purchaser

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(1) 9 B. & C. 145.

(2) 6 H. & N. 512; 30 L. J. (Ex.) 78.

(3) 8 Taunt. 540.

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the difference; and in either case would be entitled to receive it from the defendant. Then, when the 31st of October arrives, the same state of things recurs as to the second instalment of iron to be delivered; and again the damages will be the difference between the contract and market prices on that day. And a similar calculation must be made with reference to the end of November. Therefore the plaintiff will be entitled to recover, altogether, the sum of the three differences at the end of the three months respectively.

8CP174

It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or at all events when the first breach took place, and it became apparent that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favourable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell, the defendants might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Suppose, for example, his new contract was with a person who proved insolvent. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless. In either event, therefore, I do not think the plaintiff could be called upon to enter into a fresh contract. If he did, and thus obtained an advantage, he no doubt might save the defendant from some damages. But if he should suffer a loss, as by the insolvency of the new contractor, he could not make the defendant answer for it. And if it should happen that he might have done better for the defendant by waiting and making no speculative contract, the defendant would in his turn have a fair

8 C.P. 179,

right to complain that his loss had not been mitigated as far as possible.

The case of *Frost* v. *Knight* (1) has been referred to as shewing that there is a difference between cases where the contract is treated as still subsisting and where it is treated as at an end. Now the plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. But that is a matter of election on the plaintiff's part, and even although he had elected thus to treat the contract, yet in considering the question of damages they would still be estimated with reference to the times at which the contract ought to have been performed, that is, in this case, at the end of the months of September, October, or November. The damages should therefore be assessed on the principle I have indicated, and the rule made absolute to reduce the damages to 109*l.* 4*s.*

MARTIN, B. In deference to authority I come to the same conclusion. But for my own part I should have been disposed to think that the damages ought to have been estimated once for all when a complete breach of the contract had been committed. But the cases of *Boorman* v. *Nash* (2) and *Josling* v. *Irvine* (3) decide the matter. The last case, which was an action for the non-delivery of naphtha in weekly parcels, appears to place the true rule beyond doubt. In the course of the argument, Wilde, B., observes (4): "I want to know the market prices at the end of the first, second, and third weeks, when the naphtha was to be delivered;" and my Brother Channell in giving judgment says (5): "If, at the end of the first week when the first portion was to be delivered by the defendant, the price had risen, the plaintiff would be entitled to damages proportionate to the rise in price at that period; and so at the end of the second week when the second portion was to be delivered, and again at the end of the third week." Again, in his judgment, Wilde, B., repeats that the damages must be assessed with reference to the market prices on each of the days fixed for the delivery of the naphtha. The ver-

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(1) Ante, p. 111.

(2) 9 B. & C. 145.

(3) 6 H. & N. 512; 30 L. J. (Ex.) 78.

(4) 30 L. J. (Ex.) at p. 79.

(5) 30 L. J. (Ex.) at p. 80.

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dict must, therefore, be reduced in this case to the amount pointed out by the Lord Chief Baron.

CHANNELL, B. I am also of opinion that the rule to reduce the damages should be made absolute. I by no means desire to interfere with the rule that where there is a contract to deliver goods on a specific day the proper measure of damages is the difference on that day between the market and contract prices. But where the contract is to deliver in parcels at definite but different times, as here at the end of the three months of September, October, and November, there I think the difference should be taken at the end of each period. The time when a contract is broken is one thing, the time when it is to be performed may be quite another. Here it was to be performed by three separate deliveries of goods on specified days. And under these circumstances, in order to measure the damages, resort must be had to each final day of performance. The cases of *Boorman* v. *Nash* (1) and *Josling* v. *Irvine* (2) are express on this point. The right days, therefore, for ascertaining the damages were the 30th of September, the 31st of October, and 30th of November, respectively, and the total recoverable is the sum of the differences on those days. (3)

Rule absolute accordingly.

Attorneys for plaintiff: *Emmett & Sons, for Barr, Nelson, & Barr, Leeds.*

Attorneys for defendant: *Pritchard & Englefield, for Ramwell, Pennington, & Hindle, Manchester.*

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(1) 9 B. & C. 145.

(2) 6 H. & N. 512; 30 L. J. (Ex.) 78.

(3) Bramwell, B., had left the court before the judgment was delivered.

BALDWIN *v.* CASELLA.

1872
May 30.

9 CP 649
650.-1-6.

Mischievous Animal—Evidence of Scienter.

If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master.

Action brought by an infant, suing by his father as next friend, for a bite inflicted on the plaintiff by the defendant's dog.

At the trial before Cleasby, B., at the sittings at Westminster, in Trinity Term, it appeared that the dog was an ordinary carriage-dog, and was kept in a stable of the defendant situated in a mews, and was under the care and control of the defendant's coachman, who lived there. The dog ran about the mews, and there was evidence which satisfied the jury that he had once, about a year before, knocked down the plaintiff and scratched him, and that this was known to the coachman. (1) It was not, however, known to the defendant, who supposed the dog to be harmless, and allowed it to play with his own children.

The learned judge directed the jury, that if the coachman knew of the previous attack by the dog, his knowledge was the knowledge of his master, and that the defendant was liable. The jury found a verdict for the plaintiff for 10*l.*

Pope, Q.C., moved for a new trial on the ground of misdirection. The direction of the learned judge goes beyond any existing decision. The case which comes nearest to it is *Johnson* v. *Gladman* (2); but that case was decided upon the inference that the wife had in fact communicated to her husband, the defendant, the notice she had received of the dog's ferocity, or at least on the view that the jury might have fairly drawn that inference; see per Willes and Montague Smith, JJ. (3) The case therefore decides nothing; or if it decides anything, it is that but for that inference there would have been no evidence to charge the defendant. But here it was distinctly proved that the defendant had no knowledge nor suspicion of the dog's ferocity. Therefore *Johnson* v. *Gladman* (1) is either no authority or an authority in his favour. Again in *Stiles* v. *Cardiff Steam Navigation Company* (2), it is thrown out that if those had notice who were appointed by the owner of the dog to keep it, with "power to put an end to the keeping of it," notice to them would be notice to the owner. But there is no decision to that effect; and, moreover, there is no evidence here that the defendant's coachman had power to put an end to the keeping of the dog.

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(1) The evidence was very scanty, but the verdict being under 20*l.*, the defendant could not move against evidence. In order to prove the vicious temper of the dog, it was shewn that he had on two previous occasions attacked persons passing through the mews; but this was not known either to the defendant or to his coachman.

(2) 36 L. J. (C.P.) 153. W.N.(1867)

(3) 36 L. J. (C.P.) at p. 155.

MARTIN, B. I think the direction of the learned judge was right. The dog was kept in the defendant's stable, and the defendant's coachman was appointed to keep it; the coachman knew that the dog was mischievous, and it is immaterial whether he communicated the fact to his master or not; his knowledge was the knowledge of his master. The opinion of Crompton, J., in *Stiles* v. *Cardiff Steam Navigation Company* (3) is to that effect, and I should be slow to differ from any opinion of that learned judge.

BRAMWELL, B. I am of the same opinion. It appears to be the rule of law, that the possibility of loss and injury arising to others from things which are likely to be dangerous raises, on the part of those who have them under their control, a duty to inform themselves about them. So one who employs others to climb ladders in a place where people are passing, is bound to take care that no injury arises to the passers-by; and if he delegates to a foreman or servant the duty of seeing that the ladders are sound, the negligence of the foreman or servant is the negligence of the master. So all dogs may be mischievous; and therefore a man who keeps a dog is bound either to have it under his own observation and inspection, or, if not, to appoint some one under whose observation and inspection it may be. The defendant has appointed his coachman to that duty; the coachman knew of the mischievous propensities of the dog; and his knowledge is the knowledge of the master.

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(1) 36 L. J. (C.P.) 153. WN (1867) 15.
(2) 33 L. J. (Q.B.) 310, at p. 312. 10 Jur N.S. 1199
(3) 33 L. J. (Q.B.) 310. 10 Jur N.S 1199

Channell, B., concurred.

Rule refused.

Attorney for plaintiff: *Charles Thomas.*
Attorney for defendant: *Crump.*

DANIEL and Others *v.* STEPNEY and Another.

June 8.

Landlord and Tenant—Rent-charge—Distress upon Lands not included in the Demise—Mines.

3 C.P.D. 696
701,

Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall for the time being be in course of working by the lessees, their executors, administrators, and assigns":—

Held, that this power of distress did not run with lands owned by the lessees at the time of the demise, and through which the mines were worked, so as to bind them in the hands of assignees.

Revd in Ex Ch LR 9 Ex 185.

Declaration. 1st count, for entering plaintiffs' lands and taking and carrying away fixtures and goods of the plaintiffs, and disposing of the same to the defendants' use.

2nd count, trespass de bonis asportatis.

Plea, on equitable grounds, that before, &c., the defendant Stepney by deed demised to John Evans and others (therein called the lessees), their executors, administrators, and assigns, so much of a certain seam of coal and culm as was situate under certain lands delineated in a plan, and thereinafter called the described lands, for a term of forty years, from the 26th of March, 1869, subject to the payment by the lessees of the rents, royalties, and sums of money thereby reserved; and it was provided by the deed that in case any of the rents, royalties, and sums of money by the said deed reserved or made payable should be unpaid in part or in the whole for twenty-one days next after the same should have become due and should have been demanded, it should be lawful for the reversioner, by himself or his agent or servant, or by any person by him or by his surveyor or agent in such behalf authorized, to distrain all and every or any of the coal, culm, or materials, and also the horses, gins, engines, whimsies, wagons, carts, ropes, rollers, tools, live and dead stock, utensils, and materials, goods, chattels, and effects employed upon, under, about, or in connection with the said works, as well within the limits of the said described lands or any part or parts thereof, as also in, upon, under, or about any lands other than the said described lands in which there should for the time being be any pits or openings by or through which the coal or culm by the said deed demised or any part thereof should for the time being be in course of working by the lessees, their executors, administrators, and assigns, and for that purpose to enter into such other lands as well as the said described lands; of all which premises the plaintiffs had notice before they had any estate or interest therein.

That at the time of the making of the said deed, and before the plaintiffs had any estate or interest in the lands in which, &c., the lessees were possessed of and well entitled to lands other than the said described lands for the residue of a term of years not then expired, and afterwards and before the said times when, &c., all the estate and interest of the said lessees of and in the said lands other than the said described lands (being the said lands in which, &c.), and also in the said described lands, and of and in all the coal, culm, and materials, and also the horses, &c., &c., employed upon, under, about, and in connection with the said works referred to in the recited deed, as well upon the said lands other than the said described lands as in the said described lands, became and were vested in the plaintiffs, by assignment to them as trustees under a deed of settlement, dated the 30th of April, 1870, and made by John Evans and others (the said lessees) of all their real and personal estate in trust for the benefit of creditors, and thereby and not otherwise the plaintiffs became and were possessed of and entitled to the said lands in which, &c.

That afterwards, and during the said term, 176*l.* 6*s.* 3*d.* of the said rent became due, and was unpaid; that all times elapsed and all conditions were performed, and all things happened necessary to entitle the defendant Stepney to distrain upon the goods, chattels, and effects of the said lessees, their executors, administrators and assigns in the said deed mentioned, and for that purpose to enter upon such other lands as well as the described lands; and that the defendant Stepney, by the defendant Rosser, as his agent thereto in such behalf authorized, did thereupon enter upon the said lands other than the said described lands, such other lands being lands upon which there were then pits or openings by or through which the coal or culm by the said deed demised was then in course of working by the plaintiffs as trustees for the said lessees, their executors, administrators and assigns, for the purpose of distraining, and did there take and distrain divers goods and chattels, that is to say, coal, culm, materials, horses, &c., which were being employed, worked, gotten, raised, and used upon, under, and in connection with the said works, as a distress for the said rent still remaining due and unpaid, which are the alleged trespasses.

Demurrer and joinder.

May 27. *Beresford* (*Manisty, Q.C.*, with him), in support of the demurrer. The defendant is seeking to distrain upon land out of which no rent issues. No such incident has ever been annexed to land, and it would be contrary to principle to allow it: *Ackroyd* v. *Smith.* (1) The plea states that the land on which the distress has been levied was at the time of the demise the property of the lessees; even assuming this to be so, and that the grant of the power of distress had been in terms limited to such lands, the grant would be bad, because no lands are named, nor does any rent issue out of them. But the grant must be construed according to its actual terms; and its terms are neither limited to any definite lands, nor even to lands then owned by the lessees, but extend to any land whatsoever through which the minerals in the lands demised should be at any time worked.

Giffard, Q.C. (*C. E. Coleridge* with him), in support of the plea. The deed makes the rent reserved a rent-charge on the adjoining lands. It is within the words of Littleton's 221st section (Co. Litt. 146 b), "if one make a deed in this manner, that if A. of B. be not yearly paid at the feast of Christmas for term of his life 20*s*. of lawful money, that then it shall be lawful for the said A. of B. to distrain for this in the manor of F., &c., this is a good rent-charge; because the manor is charged with the rent by way of distress." The same is laid down in Gilbert on Rents, p. 40; and at p. 42 it is said, "if there be lord and tenant by certain rent, and the tenant grants by indenture to his lord that he may distrain for the same rent in all his lands within the same town, and he hath other land there, yet this grant doth not create a new rent, but only gives a more extensive remedy for the old." This passage shews that no doubt was entertained about the validity of such a power of distress; the only question discussed is, whether the grant created a new rent; it also shews that the principle was applied to the case of landlord and tenant: see also Brooke's Abr. Rents, pl. 1.

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(1) 10 C. B. 164; 19 L. J. (C.P.) 315.

[BRAMWELL, B. The passages in Gilbert and in Brooke are founded upon the Year-book 9 H. 6, 9 a (Pasch. pl. 23), and refer to a grant of a power of distress over definite lands; but it is laid down in the Year-book 41 E. 3, 15 b. 16 a (Trin. pl. 8), that a grant of distress over other lands, not naming them, is void for uncertainty.]

The lands are sufficiently defined, and the range of the power is limited by the circumstance that the mines demised are worked through them. The mines are a hereditament out of which rent can issue: *Jones* v. *Reynolds*. (1) Upon these grounds the plea is good at law; but if not good at law it is good as an equitable plea, the plaintiff having taken with notice of the grant: *Morland* v. *Cook*. (2)

Beresford, in reply. The only question is, whether this is a burden which runs with the land, or whether it is only a personal covenant. The deed clearly does not make the rent a rent issuing out of any lands other than the lands demised, no other lands being named; it amounts therefore merely to a grant of the right to take chattels upon unnamed and undefined premises; and no precedent can be cited of effect being given in equity to such a grant.

Cur. adv. vult.

June 8. The judgment of the Court (Kelly, C.B., Martin, Bramwell, and Channell, BB.), was delivered by

KELLY, C.B. In this case a right is claimed under a covenant in a deed of demise of a coal-mine, to distrain for rent reserved under the demise not only upon the mine or land demised, but upon other land belonging to the lessees or their assignees.

(1) 4 A. & E. 805.

(2) Law Rep. 6 Eq. 252.

The covenant is that the lessor may distrain certain chattels upon any land in which pits should be opened, through which the coal demised should be in a course of working. It happens in this case that the land in which the distress has been made was held upon lease by the lessees at the time of the demise, and has since, together with the mines, passed from them to the plaintiffs by assignment. But it might have come into the possession of the plaintiffs the day before the distress; and it might have consisted of a single close, or of an estate of 10,000 acres. And it might be conveyed away by the plaintiffs before another year's rent became due, and the plaintiffs might then have become possessed of other lands in which a pit might have been opened through which the coal was obtained, and so these other lands, if this distress can be maintained, would be liable to another distress. This shifting character thus attaching to the land, and the uncertainty of its limits, and the tenure by which it is held, are inconsistent with any right of distress incident to either a rent-charge or rent-service. A rent-service issues out of the land demised, and passes with the right of distress to the reversioner. Here the rent is claimed and the distress made, not upon the mine or premises demised, but upon land of which the distrainor is not the reversioner.

But it has been contended that this rent is a rent-charge, and that a distress may be made upon other lands of the grantor than those out of which the rent issues. A rent-charge is thus defined by Littleton: "If a man seised of certain land grant, by a deed-poll or by indenture, a yearly rent to be issuing out of the same land to another in fee or in fee-tail, or for term of life, &c., with a clause of distress; then this is a rent-charge": Co. Litt. s. 218. And no doubt such a rent may be charged upon other lands belonging to the grantor. In such a case, however, the lands out of which the rent issues, and the other lands upon which it is charged, and the tenure by which they are held, and the quantity and description of the estate, are all specified and defined, and appear by the grant. Further, the land so charged remains liable to the rent-charge, notwithstanding any subsequent alienation, and no lands afterwards acquired by the party liable to the rent-charge can be affected by it; whereas by the terms of this covenant any lands they afterwards acquired, and whatever might be their ex-

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tent or value, are to become liable to a distress if a pit be dug within them communicating with the mine. No such rent-charge ever existed, or can exist by law, issuing, not out of lands specified in the grant, but out of any lands which may at any time afterwards become the property of the covenantor, and in which a pit may be sunk to work the mine.

In this case the supposed right to distrain exists only under a covenant, which may possibly support an action against the covenantor, but which, if it could be held to pass with the land demised to an assignee, whether of the lessor or the lessee, cannot attach to other land in which the lessor or his assignee has no interest; which land cannot by a personal covenant be made liable to any species of distress known to the law.

Judgment for the plaintiffs.

Attorney for plaintiffs: *Hacon.*
Attorney for defendants: *Calcott.*

June 22.

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GILL v. THE CONTINENTAL UNION GAS COMPANY, LIMITED.

Charging Order on Shares—Construction of Words "in his name in his own right"—1 & 2 *Vict. c.* 110, *ss.* 14, 15.

In an action, under 1 & 2 Vict. c. 110, s. 15, against a company for permitting the transfer of shares after notice of a charging order nisi, and before the making of it absolute, it is a good answer to shew that the judgment debtor in whose name the shares stood had no beneficial interest in them.

DECLARATION: stating that the plaintiff brought an action against W. M. Shaw, and on the 13th of February, 1872, recovered judgment for 161*l.* for debt and costs; that on the 16th of February a charging order for the amount was made by Hannen, J., under s. 14 of 1 & 2 Vict. c. 110, on 100 shares standing in the name of Shaw in his own right (1) in the defendants' company; [setting out the order]; that the defendants were a company registered under the Joint Stock Companies Acts; that notice of the order was on the same day given to an authorized agent of the defendants, according to s. 15 of 1 & 2 Vict. c. 110; that after the service of such notice, and before the order was discharged or made absolute, the defendants, contrary to the said order of Hannen, J., permitted a transfer of the said shares charged by the said order to be made, whereupon the defendants by virtue of the said statute became liable to the plaintiff for part of the value of the said property so charged and so transferred (the said shares exceeding in value the said judgment debt, and all interest in respect thereof) which might be sufficient to satisfy the said judgment debt, which still continued wholly unsatisfied, and that all conditions, &c. Yet that the defendants had not paid the said part of the said value or any part thereof.

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(1) The words "in his own right" were in fact omitted in the first two counts, which were demurred to on that ground. In a third count the first, and in a fourth count the first, second, and third were repeated, with the addition of these words.

Second count repeating the allegations in the first count, and averring further, that after the defendants had so permitted the said transfer to be made, and after the shares ceased to stand in the name of Shaw, the order of Hannen, J., was on the 14th of March made absolute by Willes, J.

Plea, 2, to the whole declaration, on equitable grounds, that on the 28th of December, 1871, Shaw, for valuable consideration, sold to H. Fawcus all his right, title, and interest of and in the said shares, and by an instrument in writing assigned and transferred the same to Fawcus; that Fawcus on the 17th of January 1872, gave notice of the sale and transfer to the defendants, and produced to them the transfer and requested them to register the same according to the statute, and the defendants received the same for the purpose of such registration; that before registration the defendants discovered that the transfer was not duly stamped, and thereupon returned the same to Fawcus for the purpose of his procuring the same to be duly stamped; that on the 19th of February the defendants received back from Fawcus the transfer duly stamped for the purpose of registering the same, and they thereupon did register the same; and that save as aforesaid they did not permit any transfer of any shares standing in the name of Shaw after notice of the order of Hannen, J.

Replication, 3, to the second plea, that the defendants were and are a company incorporated under the Companies Acts, and that no entry of any trust affecting the shares was made on their register of members; that the defendants did not agree or become bound to register the alleged assignment and transfer; that the same was not received back within a reasonable time; that the defendants were not under any obligation to register it; and that they received back and registered the same after they had notice of the charging order, and by collusion with Shaw, and on his depositing money by way of indemnity with them, and on an indemnity by Fawcus, and to defeat the charge in favour of the plaintiff.

4. Also to the second plea, repeating the statements in the third replication, and averring that the alleged assignment and transfer was by way of mortgage, and subject to an equity of redemption in Shaw which subsisted when the charging order was made, and when the defendants had notice thereof.

Demurrers to the second plea and to the third and fourth replications, and joinder.

Webster (*Tabor* with him), in support of the demurrer to the plea, and of the replications. The plaintiff has, under 1 & 2 Vict. c. 110, ss. 14, 15, a clear right of action against the defendants. (1)

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(1) By 1 & 2 Vict. c. 110, s. 14, when any person against whom judgment shall have been entered up in any of the superior courts at Westminster shall have government stock, or stock or shares in any public company, "standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor.'

By s. 15, "in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge," it is enacted, that a charging order under the Act "shall be made in the first instance ex parte, and without any notice to the judgment debtor, and shall be an order to shew cause only; and such order if any Government stock, funds, or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or

The Act is careful to make provision against the judgment creditor being deprived of the benefit of the charging order by acts done between the making of the order nisi and its being made absolute. After the order is made absolute the creditor has (by s. 14) all the remedies which a charge made in his favour by the judgment debtor would give him; meanwhile, he is protected by s. 15, which absolutely prohibits the company from allowing the transfer of the shares after notice of the order nisi, and gives him an action against them if they disregard the prohibition. The answer which the plea makes to this is, in substance, that the shares were not standing in the name of Shaw in his own right; that is the only answer that could avail. The facts therefore alleged by the plea must, to make the plea good, amount in substance to this. What the allegations of the plea shew is, that the shares had been transferred to Fawcus. But this is no answer; the declaration shews that the shares are shares standing in the name of Shaw in a company registered under the Companies Act, 1862, by which the person actually registered is the owner of the shares which stand in his name, and no notice of trusts is allowed to be entered on the register (25 & 26 Vict. c. 89, ss. 23, 30). *Cragg* v. *Taylor* (1) is a distinct authority that under such circumstances the shares standing in Shaw's name are shares standing in his name in his own right, and are the proper subject of a charging order under a judgment against him, and that the existence of equitable interests in other persons is not to be considered. The earlier case of

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shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the mean time shall be valid or effectual as against the judgment creditor;" and further, that unless cause is shewn within a time to be mentioned in the order, the order shall, after proof of notice to the judgment debtor, be made absolute.

(1) Law Rep. 1 Ex. 148.

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Fuller v. *Earle* (1) is to the same effect; and these cases are not inconsistent with the power which the creditors of those equitably interested also have of charging their equitable interests under the following words of the section, or under 3 & 4 Vict. c. 82, s. 1: *Cragg* v. *Taylor* (No. 2) (2); *Baker* v. *Tynte*. (3) The rights of the different parties must be decided in equity; and the company must not do anything to deprive the judgment creditor of the opportunity of deriving such benefit from the charge as he can.

[CLEASBY, B. The plea states a sale out and out to Fawcus, which excludes the possibility of any resulting interest in Shaw.]

Fawcus not having been registered, the transfer was not complete, and events might have interposed to prevent its completion.

[BRAMWELL, B., referred to *Watts* v. *Porter* (4), and the judgment of Erle, J. (dissenting) in that case. (5)]

Even assuming the decision in that case to have been wrong, and Erle, J., to have been right, the result would not be inconsistent with the decisions which lay down that the creditor is entitled to his charging order. If that case was wrong, it was wrong in those very matters which ought to be left to the decision of equity. The plea should at least in terms negative any possibility of interest in Shaw.

But assuming the plea to be good, the fourth replication is an answer to it, for it shews that an equity of redemption remained in Shaw, which must be assumed to be valuable.

Brown, Q.C. (*Masterman* with him), in support of the plea, and the demurrer to the third and fourth replications, was stopped.

BRAMWELL, B. I think this is a good equitable plea. I also think that it is good at law. Mr. Webster's proposition is, that if stock is charged which stands in the name of a judgment debtor in his own right, no transfer must be made into any other name

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(1) 7 Ex. 796; 21 L. J. (Ex.) 314.

(2) Law Rep. 2 Ex. 131.

(3) 2 E. & E. 897; 29 L. J. (Q.B.) 233. 6 Jur. N.S. 1192.

(4) 3 E. & B. 743; 23 L. J. (Q.B.) 345. 1 Jur. N.S. 133.

(5) 3 E. & B. at p. 758; 23 L. J. Q.B.) at p. 351; commented on and approved in *Beavan* v. *Earl of Oxford*, 6 D. M. & G. at pp. 524, 532; 25 L. J. (Ch.) at pp. 306, 310 (a); *Scott* v. *Lord Hastings*, 4 K. & J. at p. 633 (b); *Kinderley* v. *Jervis*, 22 Beav. at pp. 29–34 (c); 25 L. J. (Ch.) at pp. 542–544; and see *Nicholls* v. *Rosewarne*, 6 C. B. (N.S.) 480; 28 L. J. (C.P.) 273. 5 Jur. N.S. 512

(5) S.C. 1 Jur. N.S. 137.

(a) 3 Jur. N.S. 124–6

(b) 5 Jur. N.S. 241

(c) 2 Jur. N.S. 603

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between the order nisi and the making of the order absolute. He further urges that this is so, although it may be true that after the order absolute the company may be free to transfer the stock. It is difficult to suppose that this can be so; but however that may be, the only stock that is to be charged is stock standing in the name of the judgment debtor in his own right; and if an order is made otherwise, it is not within the Act, and therefore in one sense is not within the competence of the judge to make. Was then this stock standing in the name of the judgment debtor in his own right? Certainly not; for it was standing in his name in trust for the vendee, and a court of chancery would have compelled him to deal with it according to the vendee's directions, as much as if it had been originally transferred into his name as a trustee. Then in what sense was the stock standing in the debtor's name "in his own right?" The authorities cited only come to this, that an order may be made, and will be enforced in equity so far as it is available. I do not controvert those cases, when the stock is or may be partially in the right of the debtor. But the legislature has only provided for stock standing in his name in his own right, and therefore, so far as the plea is concerned, which shews there is no right in him, our judgment must clearly be for the defendants.

Then the third replication alleges collusion, and that the debtor had an equity of redemption in the stock. I think this is also bad; the word "collusion" only signifies that the defendant and the company agreed together. And although the fourth replication alleges that the debtor had an equity of redemption in the shares, it is not said that it was of any value, and it is not to be assumed that it was so. The replication should have alleged that it was a valuable interest.

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But even assume that it was of some value, and that the shares were transferred after notice. If Fawcus had the right to have them transferred into his name, the company must do it. What would be the consequence it might be difficult to see; it may be that the shares would be bound in Fawcus's hands to the extent of the debtor's interest; but it is not necessary to pronounce an opinion on that. Since not only the right had passed at common law, but equity would also have enforced the transfer against the judgment

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debtor, and compelled the company to register the same, they must be justified in doing so.

I think the rule which the cases point to is, that the judgment creditor cannot by his charging order get any more than the debtor could honestly give him, according to the opinion of Erle, J., in *Watts* v. *Porter*. (1)

CLEASBY, B. I am of the same opinion. The foundation of the whole thing is that the stock shall be standing in the name of the judgment debtor *in his own right*. These last words cannot be excluded, and a substantial meaning must be given to them. They cannot mean merely standing in his name in his own right on the register, because the register would never contain anything but his name. Now suppose that an out and out sale had taken place, the stock would not then stand any longer in the seller's name in his own right, but in the right of the person to whom he had sold. That is what the plea shews. It shews a sale by Shaw to Fawcus. The transfer had, it seems, been actually handed in, and the only reason why the stock was not already registered in Fawcus's name was that there was some difficulty as to the stamp. That gives a complete answer to the action. The whole right to and property in the stock had passed to Fawcus, and a Court of equity would treat the transaction as equivalent to a legal transfer, and would compel the company to register the transfer, and make complete at law what was already complete in equity.

Then as to the fourth replication; I think the transfer was properly made into the name of Fawcus. The interest of Shaw in the equity of redemption may be properly made a subject of charge either under 1 & 2 Vict. c. 110, s. 14, or under 3 & 4 Vict. c. 82, s. 1; and there is no reason why Fawcus, having the right to the shares, should not have them transferred into his name. I do not say that our decision is reconcilable with all that has been said in the cases referred to, but I think it is in accordance with the meaning of the statute.

Judgment for the defendants.

Attorney for plaintiff: *Dollmann.*

Attorneys for defendants: *Masterman & Hughes.*

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(1) 3 E. &. B. at p. 758; 23 L. J. (Q.B.) at p. 351.

See M. [illegible]

ALLGOOD AND OTHERS *v.* BLAKE.
ROACH *v.* BLAKE.
CLENNELL *v.* BLAKE.
REED *v.* BLAKE.

1872
June 6.

Will—General Intent—Estate to be enjoyed by one Person—"All and every other the Issue of my Body"—"Other the Issue"—Words of exclusion or completion—"For default of such Issue."

A testator devised his hereditaments to his son for life, with remainder to F., his son's eldest son, for life, with remainder to the first and other sons of F. successively in tail male; and for default of such issue, to R., the second son of his son, for life, with remainder to the first and other sons of R. successively in tail male; and for default of such issue, to the third, fourth, and other sons of his son thereafter to be born successively in tail male; and for default of such issue, to his daughter I. for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter E. for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter J. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth and fifth and other daughter or daughters of his son successively, and in remainder one after another, and to the heirs male of their bodies; and for default of such issue, "to the use and behoof of all and every other the issue of my body"; and for default of such issue to his right heirs. The will also contained a wish that the estates should be retained in the hands of one person, and should not be dispersed, and a provision that any female who inherited should with her husband (if married) assume the testator's name and arms under the penalty of forfeiting the estates. A muniment box was directed to go to the person entitled from time to time to the estates:—

Held, 1st, that the words "issue of my body" in the penultimate limitation were to be read in the same sense as "heirs of my body;" 2ndly, that, having regard to the whole will, that devise could not be read as giving the estate per capita in joint-tenancy to all who came within the class at the time the estates vested in possession; 3rdly, that the words "all and every" did not import that all were to take at the same time, but were satisfied by all taking in succession; and 4thly (Bramwell, B., dissentiente), that the word "other" was to be read not as a word of exclusion, but of completion; and that, upon these principles of construction, there was, by virtue of the penultimate limitation, a vested remainder at the death of the testator in tail general to which his son then became entitled.

This remainder descended to F., who duly executed a disentailing deed. He devised the estate to the defendant's father, from whom it descended to the defendant. In actions of ejectment, (a) by persons claiming as issue of the body of the testator as joint tenants per capita at the time the estates vested in possession, (b) by the heiress in tail general of the testator at the same period, (c) by the heir of the survivor of all the issue of the testator living at his death (other than these included in the particular limitations), and (d) by the heir in tail of the testator at his death, those being excluded who came within the particular limitations:—

Held, that the defendant was entitled to judgment.

Mandeville's Case (Co. Litt. 26 b) considered.

Affirmed in Ex Ch LR 8 Ex 161.

SPECIAL CASES stated in four actions of ejectment brought to recover possession of fourteen forty-eighth parts of a farm and ands called High Letham, in Berwick-upon-Tweed.

1872

ALLGOOD v. BLAKE.

Sir Francis Blake, Bart. (the first baronet) was at the date of his will (the 8th of March, 1780) and of his death (the 29th of March, 1780) seized in fee of the farm and lands in question, and of certain other property, including his two mansions of Twizell Castle and Tilmouth Park, then in the county of Durham (but now in Northumberland), and also of the reversion of several estates in the county of Durham expectant upon the failure of issue male of his eldest son Francis (the second baronet).

At the date of the will the first baronet had living two children, namely, Francis and Isabella. The second baronet had at that time five children living, namely, Francis (third baronet), Robert Dudley, Elizabeth, Isabella, and Sarah.

By his will the first baronet, after charging all his manors, castle-lands, &c., with certain payments (which were afterwards duly made) and creating a term of 1000 years upon certain trusts (which were afterwards satisfied) devised his hereditaments to the use of his son Francis for life, with remainder to trustees during the life of Francis, to preserve contingent remainders, with remainder to the use of Francis, eldest son of the second baronet (the third baronet), for life, with remainder to the first and other sons of the third baronet successively in tail male; and for default of such issue, to Robert Dudley Blake, second son of the second baronet, for life, with remainder to his first and other sons successively in tail male; and for default of such issue, to the third, fourth, and other sons of the second baronet thereafter to be born successively in tail male; and for default of such issue, to Isabella Blake, the testator's daughter, for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to Elizabeth Blake, eldest daughter of the second baronet for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to Isabella Blake, second daughter of the second baronet, for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to Sarah Blake, third daughter of the second baronet, for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth, fifth, and other the daughters of the second baronet successively for life, and with remainders to the heirs male of their bodies respectively; and "for default of such issue to the use and behoof *of all and every other the issue of my body* lawfully to be begotten ; and for default of such issue, to the use and behoof of my own right heirs for ever."

The testator also, after reciting that the reversion in fee of the several estates in the county of Durham was vested in him and his heirs upon failure of the male line of the second baronet, further gave and devised all and every the estates to which he was so entitled in reversion in case of failure of the male line of the second baronet to the trustees and their heirs to, for, and subject to such and so many of the uses, &c., in the will before expressed and declared of and concerning his other real estates by his will before devised on failure of issue male of the said second baronet, as should then be in existence undetermined or capable of taking effect. Immediately after the last-mentioned devise the following words occurred: "And thus having at least expressed a very natural desire to continue my name and property upon a respectable footing, and to prevent as far as may be the dispersion of my estates amongst several persons, and to keep up my name and family in one person, I do hope that the person into whose hands my estates shall come, whether by virtue of this my will or by means of fines or recoveries, or other acts in the law defeating the uses and limitations of the present entails or otherwise howsoever, will be equally ready to adopt the plan for the purposes aforesaid."

The will also contained a proviso making it incumbent on the females in the line of descent, when married, to retain, and on their husbands to take, the name and arms of Blake as and when they should respectively come into possession of the estates, and in case of neglect or refusal so to do, the person next in remainder was to take the property. Further, there was a clause whereby the testator declared his wish to be that a certain iron chest or muniment box should go to the person entitled to his real estate from time to time.

On the testator's death the second baronet entered on possession of the family estates, including High Letham, and so continued until his death in June, 1818, when he was succeeded by the third baronet, who remained in possession until his death in August, 1860. The second baronet also left two other sons surviving him, viz., Robert Dudley and William, and one daughter, Eleanor Ann. Isabella Blake, the eldest daughter of the first baronet, and Elizabeth, Isabella and Sarah Blake, daughters of the second baronet, died unmarried in the second baronet's lifetime.

In the year 1834 the third baronet executed an assurance for the purpose of barring a certain estate tail in certain messuages and lands (including High Letham), which estate tail was thereby recited to be vested in him by the will of the first baronet expectant on the failure or determination of the estates in tail male limited to the use of the first and other sons of the third baronet, and the death and failure of issue male of his brothers Robert Dudley and William and his sister Eleanor Ann, and all reversions and remainders thereon expectant or depending.

On the 15th of October, 1845, the third baronet made his will, whereby, after reciting that under his grandfather's will and other acts and assurances he was entitled to the remainder in fee of certain manors, messuages, &c. (including High Letham), he devised the whole of those manors, messuages, &c., subject to the estates limited by his grandfather's will, to one Francis Blake for life, with remainder to his first and other sons in tail male. Francis Blake died intestate in July, 1861, leaving the defendant, his eldest son and heir at law, him surviving.

Robert Dudley Blake and William Blake died without issue in the lifetime of the third baronet. Eleanor Ann intermarried with one Bethel Stag, and on the death of the third baronet entered into possession of the family estates, assuming at the same time the name and arms of Blake. She died on the 12th of August, 1869, without issue male, but leaving a daughter, Eleanor Ann Roach, her surviving, who was also heiress at law to the first, second, and third baronets.

She was the plaintiff in the second action.

Besides his daughter Isabella, the first baronet had another daughter Sarah, who died before the will was made. She married one Christopher Reed, and had numerous issue. The plaintiff in the third action, Perceval Fenwick Clennell, was her grandson. The mother of Perceval (Sarah's daughter) was the survivor of all the issue of the testator living at his death, other than those included in the particular limitations, and this plaintiff, as her heir, claimed the entirety. He was also joined in the first action, and claimed in the manner indicated below. In the fourth action the claimant was Francis Reed, a grandson of Sarah Reed. He claimed the entirety as heir in tail of the testator at his death, all those being excluded who came within the particular limitations, i.e., his claim was the same in character as that of Eleanor Ann Roach, except that he claimed as upon a remainder vested at the death of the testator, whereas in Mrs. Roach's case the remainder was contingent.

The plaintiffs in the first action were among the issue of the body of the testator of the line of Sarah Reed, and claimed the property as joint tenants under the penultimate limitation in the will. The estate, they contended, was given per capita under that limitation to all persons who came within the class at the time of the death of Mrs. Stag in 1869.

The questions for the Court in the several actions were, whether any, and which, of the plaintiffs in those actions respectively were entitled to recover.

The case was argued on April 29, May 1, and May 2, 1872, by the following counsel:—

For the plaintiffs in the first action: *Sir R. Palmer, Q.C.* (*Manisty, Q.C., Waley,* and *Bruce* with him);

For the plaintiff in the second action: *Sir G. Jessel, Q.C., S.G.* (*W. H. Bagshaw* and *Wallis* with him);

For the plaintiff in the third action: *H. F. Bristowe, Q.C.* (*Harrison Dalton* with him);

For the plaintiff in the fourth action: *Pollock, Q.C.* (*Day, Q.C.,* with him);

For the defendant in these four actions: *Sir J. B. Karslake, Q.C.,* and *Charles Hall* (*Kemplay, Q.C.,* with them).

There was also a fifth action brought by the plaintiffs in the first action in respect of other property against another defendant, who also claimed under the will of the third baronet, and whose interest was therefore identical with that of the defendant in the other actions. For him *Williams, Q.C.* (*Trevelyan* and *C. Browne* with him) appeared.

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ALLGOOD v. BLAKE.

The course and nature of the arguments sufficiently appear from the judgment.

For the plaintiffs in the first action the following authorities were cited: Lewis on Perpetuities, pp. 663–671; 2 Co. Litt., by Hargreave and Butler, 272 a, note (1), s. 5; Prior on Issue, book i. pp. 6, 12, 26; Jarman on Wills, 3rd ed. vol. ii. pp. 56, 89–91, 143; *Lee* v. *Busk* (1); *Nicholls* v. *Sheffield* (2); *Heasman* v. *Pearse* (3); *Ranelagh* v. *Ranelagh* (4); *Lewis* d. *Ormond* v. *Waters* (5); *Surtees* v. *Surtees* (6); *Greene* v. *Ward* (7); *Davenport* v. *Hanbury* (8); *De Windt* v. *De Windt* (9); *Wright* v. *Vernon* (10); *Bernard* v. *Mountague* (11); *Cooper* v. *Pitcher* (12); *Freeman* v. *Parsley* (13); *Dalzell* v. *Welch* (14); *Cook* v. *Cook* (15); *Rowland* v. *Morgan* (16); *Knight* v. *Selby* (17); *Whitelocke* v. *Heddon* (18); *Atkinson* v. *Holtby* (19); *Clavering* v. *Ellison* (20); *Egerton* v. *Earl Brownlow.* (21)

For the plaintiff in the second action were cited Co. Litt. by Hargreave and Butler, 19 a, 20 b, 22 a, 24 b, and note to 24 b; Fearne on Contingent Remainders, p. 180; Cruise's Digest, vol. i. p. 69; *Whitelocke* v. *Heddon* (18); *Mandeville's Case.* (22)

For the plaintiff in the third action were cited Jarman on Wills, 3rd ed. vol. i. p. 758; *White* v. *Coram* (23); *Morgan* v. *Britten.* (24)

For the plaintiff in the fourth action were cited Jarman on Wills, 3rd ed. vol. ii. p. 77; *Whitelocke* v. *Heddon* (18); *Grey* v. *Pearson* (25); *Lees* v. *Mosley* (26); *Roe* d. *Dodson* v. *Grew* (27);

(1) 14 Beav. 459.

(2) 1 Bro. C. C. 215.

(3) Law Rep. 11 Eq. 522; Ibid. 7 Ch. App. 275.

(4) 12 Beav. 200.

(5) 6 East, 336, at p. 346.

(6) Law Rep. 12 Eq. 400.

(7) 1 Russ. 262.

(8) 3 Ves. 257.

(9) Law Rep. 1 H. L. 87.

(10) 7 H. L. C. 35.

(11) 1 Mer. 422.

(12) 4 Hare, 485.

(13) 3 Ves. 421.

(14) 2 Sim. 319.

(15) 2 Vern. 545.

(16) 2 Ph. 764.

(17) 3 M. & G. 92.

(18) 1 B. & P. 243.

(19) 10 H. L. C. 313. 3 Jur NS 270

(20) 3 Drew. 451.

(21) 4 H. L. 1. 1[illegible] Jur 71

(22) Co. Litt. 26 b.

(23) 3 K. & J. 652.

(24) Law Rep. 13 Eq. 28.

(25) 6 H. L. C. 61, at p. 68. 3 Jur NS 6

(26) 1 Y. & C. 589.

(27) 2 Wils. 322.

Doe d. *Blandford* v. *Applin* (1); *Roddy* v. *Fitzgerald* (2); *Hannaford* v. *Hannaford* (3); *Doe* d. *Cock* v. *Cooper.* (4)

For the defendants in all the actions the following authorities were cited: — *Abbott* v. *Middleton* (5); *Jenkins* v. *Hughes* (6); *Byng* v. *Byng* (7); *Wild's Case* (8); *Doe* d. *Earl of Scarborough* v. *Savile* (9); *Earl of Tyrone* v. *Marquis of Waterford* (10); *Mandeville's Case* (11); *Wright* v. *Vernon* (12); *King* v. *Melling* (13); *Roddy* v. *Fitzgerald* (2); *Stanley* v. *Lennard* (14); *Jordan* v. *Adams* (15); *Woodhouse* v. *Herrick* (16); *Crozier* v. *Crozier* (17); *Petty* v. *Goddard* (18); *Lethieullier* v. *Tracy* (19); *Doe* d. *Gallini* v. *Gallini* (20); *James* v. *Richardson* (21); *Burchett* v. *Durdant* (22); *Greene* v. *Warde* (23); *Goodtitle* v. *Pugh* (24); *Doe* d. *Bean* v. *Halley* (25); *Roe* d. *Dodgson* v. *Grew* (26); *Parr* v. *Swindels* (27); *Doe* d. *Blandford* v. *Applin* (1); *Montgomery* v. *Montgomery* (28); *Kavanagh* v. *Morland* (29); *Taylor* v. *Sayer* (30); *Doe* d. *Cock* v. *Cooper* (4); *Broughton* v. *Langley* (31); Jarman on Wills, 3rd ed. vol. ii. p. 406; Fearne, Contingent Remainders, 80, 180, 526; Plowden, 29; Preston on Estates, vol. ii. pp. 506, 507; Hayes on Limitations, pp. 1, 28; Powell on Devises, 3rd ed. vol. ii. p. 596; Hargreave's Tracts, p. 565.

Cur. adv. vult.

June 6. The judgment of the Court (Kelly, C.B., Martin, Bramwell, and Cleasby, BB.) was delivered by

Cleasby, B. The first of the above actions, *Allgood and Others*

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(1) 4 T. R. 82.
(2) 6 H. L. C. 823.
(3) Law Rep. 7 Q. B. 116.
(4) 1 East, 229.
(5) 7 H. L. C. 68, at p. 114.
(6) 8 H. L. C. 571. 6 Jur NS 1043
(7) 10 H. L. C. 171.
(8) 6 Rep. 16 b.
(9) 3 A. & E. 897.
(10) 1 D. F. & J. 613. 6 Jur NS 567
(11) Co. Litt. 26 b.
(12) 2 Drew. 439; 7 H. L. 35.
(13) 1 Vent. 214, 225.
(14) 1 Eden, 87.
(15) 9 C. B. (N.S.) 483; 30 L. J. (C.P.) 161.
(16) 1 K. & J. 352.

(5) SC 5 Jur NS 717

(17) 3 Drur. & War. 353.
(18) Bridgman, 35.
(19) 3 Atk. 728.
(20) 5 B. & Ad. 621; S.C. in error, 3 A. & E. 340.
(21) Pollexfen, 457, at pp. 461, 462.
(22) 2 Vent. 311.
(23) 1 Russ. 262.
(24) 3 Bro. P. C. 454.
(25) 8 T. R. 5.
(26) 2 Wils. 322; S.C. in Wilmot's notes, 272.
(27) 4 Russ. 283.
(28) 8 Ir. Eq. 740.
(29) Kay, 16. 18 Jur 185
(30) Cro. Eliz. 742.
(31) 2 Ld. Raym. 873.

v. *Blake*, was brought to recover the possession of fourteen forty-eighth parts of a farm, messuages, and lands called High Letham or High Latham, in the county of the borough and town of Berwick-upon-Tweed.

The question for consideration is the proper construction of a clause in the will of Sir Francis Blake, which was executed in January, 1780. The testator died in the March following. At the time of making the will he had living a son, Francis, and a daughter, Isabella. Another daughter, Sarah, had married a person of the name of Christopher Reed, and died in the year 1771, leaving several children, male and female, surviving.

His son Francis had living at the time of making the will two sons, Francis, and Robert Dudley, and three daughters, Elizabeth, Isabella, and Sarah.

The will is technically framed, and all the life estates are followed by a devise to trustees to preserve contingent remainder. Bearing that in mind, its substance may be stated for the purpose of the present question, as follows. After charging all and singular his manors, messuages, castle lands, hereditaments, and estates, with certain payments, which are to be taken as having been duly made, and creating a term of 1000 years upon certain trusts which have been satisfied, he devised his hereditaments to his son Francis for life, with remainder to Francis, the eldest son of his son Francis, for life, with remainder to the first and other sons of Francis the grandson successively in tail male; and for default of such issue, to Robert Dudley Blake, the second son of Francis the son, for his life, with remainder to his first and other sons successively in tail male; and for default of such issue, to the third, fourth, and other sons of the son Francis thereafter to be born successively in tail male; and in default of such issue, to testator's daughter Isabella for life, with remainder to the first and other sons of his daughter Isabella in tail male; and for default of such issue, to his granddaughter Elizabeth for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to the testator's granddaughter Isabella for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to the testator's granddaughter Sarah for life, with remainder to her first and other sons successively in tail male;

and for default of such issue, to all and every the fourth, fifth, and other daughter and daughters of Francis the son successively, and in remainder one after another and to the heirs male of their bodies.

It should be here noticed that all the limitations, including and following that to Isabella, the daughter of the testator (the first female who comes in), are expressly made subject to a proviso or condition in the will, contained in the name and arms clause which will be particularly noticed hereafter.

The next limitation is the one upon which the question arises, and is in the following words:—

"And for default of such issue to the use and behoof of all and every other the issue of my body." And upon this there immediately follows another limitation: "and for default of such issue, to my right heirs for ever."

The first of the two limitations may be correctly called, as was done through the argument, the "penultimate" limitation, and the latter one the "ultimate" limitation. The particular words "to all and every other the issue of my body," taken by themselves, were, it was contended, susceptible of two meanings: they may be taken to signify a distribution as if the testator had said "to and *among* all and every the issue, &c.," in which case they would be words of purchase; or they may signify succession and not distribution like "heirs of the body," in which case they would be words of limitation, although they might also in some sense operate as words of purchase according to *Mandeville's Case* (1) as will afterwards be pointed out.

In considering which of these two senses should be given to the words, it was important to examine other parts of the will to see whether there was any clear general intent of the testator which could properly be considered as applicable to the construction of the penultimate limitation. And upon the meaning and effect of other parts of the will there was a very full argument before us.

In addition to the estates of which the testator was seized in possession he was entitled in reversion, upon the failure of male issue of his son Francis, to certain estates in the county of Durham, and he devised this reversion to such of the uses limited in the will concerning his other estates upon such failure of male issue of his son as should then be in existence and capable of taking effect. And after the last-mentioned devise the following clause occurs in the will:—

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(1) Co. Litt. 26 b.

"And thus having at least expressed a very natural desire to continue my name and property upon a respectable footing, and to prevent as far as may be the dispersion of my estates amongst several persons, and to keep up my name and family in one person, I do hope that the person into whose hands my estate shall come, whether by virtue of this my will, or by means of fines or recoveries, or other acts in law defeating the uses and limitations of the present entails, or otherwise howsoever, will be equally ready to adopt the plan for the purposes aforesaid."

Another clause referred to was the clause making it incumbent upon the females in the line of descent, when married, to take the name and arms of Blake, the language of which was much discussed, and which was in the following words:—

"Upon this express condition, that they the said several persons above named, and the several and respective husbands of such of them as shall marry, and their respective sons and issue male, who are to take by virtue of and under the limitations hereinbefore contained, do and shall, when and as they shall respectively come into and be in the actual possession of my said real estates or any part thereof by virtue of or under the limitations hereinbefore mentioned and contained, and during such time as they shall respectively be in possession of the same estates and premises or any part thereof, and for ever thereafter assume and take upon himself, herself, and themselves respectively, and continue to use the surname of Blake only, and no other surname, and bear the coat of arms of that family, and shall in all deeds, writings, letters, and other instruments of writing, be styled and called by the surname of Blake only, and set, and subscribe, and write his, her, and their names respectively Blake only to all and every such deeds, writings, letters, and other instruments. And that in case such person or persons as aforesaid shall neglect or refuse so to do for the space of six calendar months next after he, she, or they shall become so entitled to the said estates as aforesaid, the person or persons so neglecting or refusing shall not have or take any benefit, estate, or interest under or by virtue of this my will of or in the said estates and premises, and that in such case the person who by virtue of the limitations aforesaid is to take next in remainder after the person or persons so neglecting or refusing shall enter upon, have, and enjoy all the said estates and premises in as full and beneficial a manner as if the person or persons so neglecting or refusing was or were actually dead. Provided that such person in remainder to take by virtue or in consequence of such neglect or refusal shall assume and take upon him or her and continue to use the surname of Blake only, and bear the coat of arms of Blake as aforesaid."

And, further, the language of the clause in the latter part of the will relating to the iron chest or muniment box was alluded to, in which the testator declares his will to be, that it shall go to the person entitled to his real estates from time to time.

It was contended on the part of the defendant, that the whole will taken together shewed in the clearest manner a general intent in the testator that the estate should go to be enjoyed by one person in any possible line of descent from him before the devise to the heirs general would take effect.

He relied upon the manner in which the successive life estates forming separate lines of descent were specified as far as they possibly could be, and to the words "all and every" of the penultimate limitation itself. Particular stress was laid upon the penultimate limitation being followed by the words, "and in default of such issue," and by a devise over in fee, these same words "and in default of such issue," having been used after every other devise of an estate tail to introduce the next limitation. It was said this shewed conclusively, at all events, that the penultimate limitation could not have the effect of a devise in fee, as there was a remainder following upon it in exactly the same words as all the other remainders in the will. And although under this will, which was made before the 31st of December, 1833 (3 & 4 Wm. 4, c. 106, s. 3), the heirs of the testator who took under the ultimate limitation would take by descent and not as devisees, this makes no difference as to the intended effect of the previous limitations which we are now considering.

It will be noticed that every estate tail in the will is followed by the words "and in default of such issue," and it was said that as those same words followed the penultimate limitation, it is reasonable to read them as embracing the same idea, viz., the failure of estates tail; and it was argued, and we think with great force, that if you once come to the conclusion that the penultimate limitation operates as a devise in tail, it almost follows that successive estates tail were intended, and not so unusual and inconvenient an arrangement as joint estates tail in any number of persons, especially when the testator indicated so clearly his wish that the estate should not be divided.

In answer to the argument that in a will carefully framed, and in which every estate tail was created by the proper technical words, the penultimate limitation alone contained a devise to "issue," it was pointed out that the frequent repetition of the words "in default of such issue" after each devise in tail, shewed that the word "issue" was throughout used as embracing all the heirs of the body. The defendant also relied upon the clause already referred to in which the testator expresses his wishes as to the conduct to be pursued by his successors. And it was said that if the testator's mind was directed to the time when the limitations in the will should enable those who took the estate to make fresh settlements, and so prevent the dispersion of the property, he must have intended so far as his own will could do so, to carry this into effect, and the penultimate limitation therefore ought to receive a construction which would carry that into effect.

The language of the clause is very comprehensive, for the hope expressed is that the persons into whose hands the estates shall come, whether by virtue of the will or by means of fines and recoveries, shall be ready to adopt his plan for keeping up the name and family in one person; and this includes all who take estates tail, whether under the will or by means of fines and recoveries. The name and arms clause indicated, it was said, distinctly the same intent; and the clause relating to the muniment box was also referred to as not immaterial, and particularly the language of it, viz., that it should go to the person entitled to the estates from time to time.

It was contended on behalf of the plaintiffs in the first action that the object of the testator was sufficiently carried into effect by the various specific limitations preceding the penultimate one, and that, an adequate effect having been given to that intention, it was unnecessary to employ it in construing that limitation, more especially when the construction contended for was contrary to the proper meaning of the words used; and further, that the clause relating to the conduct of his devisees shewed what he wished the first and other tenants in tail to do, and had no reference to the multiplying the tenancies in tail. It was also pointed out that the forfeiture by which the name and arms clause was enforced was inapplicable to any persons who took under the penultimate clause, and also that the clause relating to the muniment box was of little effect, since that it would vest absolutely, being a personal chattel, in the first tenant in tail, for want of the intervention of the usual trustees to make it an heirloom. So far as this part of the argument is concerned, we think there does appear clearly upon the face of the will, and throughout it, an intention on the part of the testator so to limit the estate as to keep the name and estates and family in one person, and that all the devises and particular limitations are introduced as subordinate to, and for the purpose of carrying into effect, this general intent. And having adverted to the arguments on both sides, we do not think it necessary to recapitulate them in favour of this conclusion; but we may say, in reference to those on the other side, that the existence of this intent is not negatived by some of the provisions introduced for the purpose of carrying it into effect being imperfect in their operation.

We had brought before us many authorities for the purpose of shewing to what extent the Courts and the House of Lords had gone in construing particular provisions, so as to carry into effect what has been called the general intent, and how, in some cases, words have been rejected, and a particular intent expressed by them has been sacrificed.

Two of the latest authorities have certainly a strong bearing upon the present case, and may well be noticed: *Jenkins* v. *Hughes* (1) and *Byng* v. *Byng*. (2) In the first there was a clause corresponding with the clause in the present case, expressing the testator's wish as to the conduct of his successors, and in the

(1) 8 H. L. 571. 6 Jur N S 1043 (2) 10 H. L. 171.

second there were clauses corresponding with the name and arms clause and the clause as to the iron chest.

In *Jenkins* v. *Hughes* (1) the 9th clause in the will contained the following words: "My express will and desire being that my estates do always descend in the male line."

The question being whether the great-nephew of the testator took an estate tail by force of certain words which, taken by themselves, would have a different operation, Lord Cranworth says: "But the general emphatic direction contained in the 9th clause seems to me to justify us in holding the true construction of the will to be that Thomas took an estate in tail male."

In the other case of *Byng* v. *Byng* (2) the will contained a name and arms clause, and also a clause directing that Holbein's portrait of Archbishop Cranmer, and other chattels, should go as heirlooms with the estate. The devise was to A. B. and his children. As there were several children born at the time of the devise, the effect of the devise, taken by itself, was to make "children" a word of purchase, and to make the children take as joint tenants with A. B., according to *Wild's Case.* (3)

Lord Cranworth's language at p. 181 is remarkable in its application to the present case: "There are two passages in the will which bring me to the conclusion that the testatrix could not have contemplated a joint tenancy among the niece and her children." He then refers to and reasons upon the name and arms clause, and at the end of the paragraph says: "For these reasons I think the direction to take the name and arms tends strongly to shew an intention to keep the estates in a single line of enjoyment, and not to divide them among an indefinite number of objects." The other passage alluded to is that making the portrait and other chattels heirlooms, and he refers to that as suggesting arguments of greater weight than the other. Lord Kingsdown, who says that he had given to the case an anxious consideration, having at first had a different impression, refers, at p. 187, to both the above matters as aiding in the construction, and the result was that the word "children" was held to be a word of limitation.

It is not at all necessary in the present case to act upon the rule

(1) 8 H. L. 571. 6 Jur NS 1043 (2) 10 H. L. 171.
(3) 6 Rep. 16 b.

of carrying into effect the general intent to the extent to which it has been acted upon in such cases as *Doe* d. *Blandford* v. *Applin* (1) and *Doe* d. *Cock* v. *Cooper* (2), where a particular provision, clearly expressed, has been rejected. The utmost extent to which (if at all) it need be applied is that modified form to which it is limited by Lord Redesdale in *Jesson* v. *Wright* (3), and is approved of by the Court of Queen's Bench in *Doe* d. *Gallini* v. *Gallini* (4), viz., "that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." And if the words of the penultimate limitation had, by the force of certain decisions, acquired technically the sense of a distribution in joint tenancy, we should feel justified in departing from that sense when so clearly opposed to the intent of the testator, and giving them any other sense which they would fairly bear. In reality, when we are dealing with a will which is one document, expressing all the intentions of the testator, and which ought, therefore, to be read as a consistent whole, if a question arises as to the effect of a particular clause, the language of which is by possibility susceptible of two meanings, we are naturally and almost irresistibly influenced by the impression derived from the whole will of what the main object and intent of the testator was in making it, assuming, of course, such an object and intent to be apparent upon the face of it; and it is perhaps in this way that the general intent has been so much acted upon.

To come now to the words of the penultimate limitation, "To all and every other the issue of my body." It was contended, on behalf of the plaintiffs, that in general a devise by a testator to his issue gave an estate to all his issue—children, grandchildren, &c.—as joint tenants in fee, and that all came within the devise who were in existence at the time of vesting in possession. Many authorities have been mentioned in which this rule had been followed in cases of personalty: *Davenport* v. *Hanbury* (5) and other cases collected in Jarman, 3rd ed. vol. ii. pp. 89, 90; and to some extent the same rule has been followed in cases of realty: see *Cook* v. *Cook* (6); and the word "estate" was referred to as incorporated

(1) 4 T. R. 82.
(2) 1 East, 229.
(3) 2 Bligh, 1.
(4) 5 B. & Ad. 621.
(5) 3 Ves. 257.
(6) 2 Vern. 545.

in the devise, so as to carry the fee without any words of limitation. But without relying upon any general intent, it has never been questioned that words ought to be construed by, or along with, the context of which they may be said to form part.

Now, we find in the will before us a long series of devises specifically carrying the estate through all the lines of one part of the testator's issue, each line being followed by the words, "in default of such issue," and upon failure of all those lines there is a devise, "to all and every my other issue," and afterwards, in default of such issue, a devise to his right heirs in fee. We think it would be unreasonable to hold that because the specified male lives had been exhausted, the word "issue" was to be read in a different sense from the sense in which it had been used so often before, and that the whole series of devises were not to be read as consecutive limitations of the same estate.

The ultimate limitation in fee we read as dealing with the same estate as all the previous limitations, viz., the whole estate as one, and the failure of issue is the failure of issue to take the whole, and not several parts.

It was suggested on behalf of the plaintiffs that the ultimate limitation might be read, not as a remainder upon the previous estate, but as intended to provide for the case of there being no one to take under all the previous limitations at the testator's death. We think this wholly inadmissible, for, without referring to the state of the testator's family, there are many separate devises to his living children and grandchildren, besides others to their issue unborn.

The ultimate limitation in fee is a great difficulty in the way of the plaintiffs' contention, and the effect of it cannot be got rid of in the way suggested, or, as far as we can see, in any other way.

It was urged by the learned counsel for the plaintiffs that, properly, the word "issue" referred to procreation, not inheritance; the word "heirs" to inheritance, and not procreation; and the words "heirs of the body," to procreation and inheritance. But though this is the primary sense of the words taken by themselves, yet we know frequently the word "heirs," taken with the context, becomes heirs of the body; and the word "issue," when used in a will in connection with previous life estates and with limitations in default of issue generally, refers to inheritance as well as procreation, and is equivalent to heirs of the body.

We see no reason to doubt that the remark upon the case of *King* v. *Melling* (1), quoted by Mr. Hayes in his principles for expounding dispositions of real estate (a work frequently referred to in the argument) is applicable to the present case. It is found at the top of Table 3:—

"It has been established, ever since the case of *King* v. *Melling*, that in a will the words "issue of the body" are as strict proper words of limitation as "heirs of the body," and equally give an estate tail in lands legally devised (per Lord Hardwicke). We see no reason why the words must receive a different meaning in a devise by the testator to the issue of his own body from that which they would receive in a devise to the issue of the body of another person."

In the present will the use of the words "in default of such issue" throughout, after a devise to the heirs male of the several tenants for life, and the form of the penultimate devise followed by the devise over in default of issue, justifies us in reading the word "issue," in that devise, as equivalent to "heirs of my body."

We do not think the words "all and every," in themselves, when applied to issue, necessarily import distribution. In *Surtees* v. *Surtees* (2), quoted by the learned counsel for the plaintiffs, the words "to the use of every son of J. S. living at the death of the eldest son of J. S., or born during the testator's lifetime," were held to give to each son a separate interest. But the words "son or sons" (excluding the next generation) are very different from the word "issue" which takes in all descendants, and the naming a time when the objects of the gift were to be ascertained to the exclusion of others coming within the description, seems to refer to a separate interest in each of them.

On the other hand, in *Cradock* v. *Cradock* (3), the words "all and every" occurred. The words, after other devises in tail, were "and in default of such issue to the third and all and every other the son and sons of A., and the heirs male of such son and sons, and in default of such issue to the testator's right heirs." It was

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(1) 1 Vent. 225, 232.
(2) Law Rep. 12 Eq. 400.
(3) 4 Jur. (N.S.) 626.

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held these words gave the third and other sons estates in succession in tail male, and that the third son took the entirety.

No authority was referred to in which the words "all and every the issue," coupled with any context such as we have here and applied to real estate, had been held to make a joint tenancy either in fee or in tail.

Reading the penultimate limitation, then, as a devise to the heirs of the body of the testator, and for the present supposing the case not to be complicated by the addition of the word "other," we think the case would be governed by *Mandeville's Case* (1), and that the effect of the devise would be that there would be a remainder under which all the heirs of the body of the testator would take in the same manner as if the testator had been tenant in tail, and the heirs of his body had taken by succession from him.

The case is given in Co. Litt., p. 26 b. The section of Littleton deals with such a case as well as the commentary. The text is, s. 30: "Also if a man hath issue a son, and dyeth, and land be given to the son and to the heirs of the body of his father begotten, this is a good entail, and yet the father was dead at the time of the gift, and there be many other estates in the tail by the equity of the said statute which be not here specified."

The statute referred to is, of course, the Statute of Westminster 2 (de donis). The Commentary gives *Mandeville's Case* (1):—"John de Mandeville died leaving a wife, Roberge, and issue Robert and Maude. Michael de Mandeville gave certain lands to Roberge and to the heirs of John de M. on her body begotten, and it was adjudged that Roberge had an estate for life and the fee tail vested in Robert, and that when he died without issue Maude, the daughter, was heir of the body of her father per formam doni."

This case has been the subject of much comment. It is discussed by Fearne (Contingent Remainders, p. 82), where he says that Hale called it, with his emphatic accuracy, a quasi entail; and more fully in Butler's note, who calls it an anomalous case. There are some excellent remarks upon it of Vice-Chancellor Kindersley, in *Wright* v. *Vernon.* (2) It was acted upon in that case, and also in the same case, on appeal, *Vernon* v. *Wright* (3), and is undoubted law. If it is objected that something like a fiction is introduced, it certainly has the merit (as pointed out by the Vice-Chancellor in the case referred to) of carrying into effect the intention of the testator that all the heirs of the body should be included.

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(1) Co. Litt. 26 b.

(2) 2 Drew. 439.

(3) 7 H. L. 60.

In the case referred to the devise was to the heirs of the body of a third person deceased, but we think the same rule applicable to a devise to the heirs of the body of the testator, which can only take effect upon his death. The learned counsel for the plaintiffs did not dispute that it was so applicable, and so that if there was a devise to A and the heirs of his body, and upon failure of such issue to the heirs of the body of the testator, and in default of such issue to the testator's right heirs, there would at the death of the testator be a vested estate tail in remainder upon failure of A's issue in the heirs of the body of the testator descendible as in *Mandeville's Case* (1), with a remainder in the testator's heirs general.

We have only then to consider how far the additional word "other" affects the meaning and makes the rule in *Mandeville's Case* (1) inapplicable. And if the necessary meaning of that word was to exclude out of the operation of the penultimate limitation any part of the issue of the body of the testator, the rule in *Mandeville's Case* (1) would not be applicable, or rather could not be made applicable, by qualifying the strict and proper meaning of a word, as was done in *Jenkins* v. *Hughes* (2) and the other cases referred to, in order to carry into effect the clear intent of the limitation that all the issue of his body should be exhausted before the estates went over to his collateral heirs.

But it does not appear to us that the word "other" has any effect by way of exclusion at all, and for this simple reason, that there is nothing to exclude. The penultimate limitation for the benefit of "all and every other the issue of the body" is only to come into operation when the rest of the issue not comprehended in the word "other" have been exhausted and extinguished.

The distinct effect of the word other may be illustrated thus: If the testator's issue consisted of two classes, A and B, and he was to dispose of two estates, and give the first to class A in tail and the second to all and every the other issue (which would be class B), in that case both devises would come into operation at the same time and both estates be enjoyed at the same time by A and by the other issue, and A would be excluded from the enjoyment of the second estate, and the other issue from the enjoyment of the first.

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(1) Co. Litt. 26 b.

(2) 8 H. L. 571. 6 Jur NS 1043

In that case the word "other" would for ever exclude class A from the enjoyment of the second estate.

But it is different if there is one estate to be enjoyed in succession by A, and by the other issue, and only by the other issue, on the extinguishment of A. Thus if the estate be given to class A in tail male, and upon failure of issue to the other issue of the testator, it is obvious that the word "other" does not operate to exclude class A from the enjoyment of the estate which has already been enjoyed by class A until its extinguishment, but its only effect is to include the other issue. The rule, "Expressio unius est exclusio alterius," therefore, does not apply when the other has been included in the gift before. In short, in the case put of two classes of the issue A and B, and a devise to A, and upon the extinguishment of A to B, the effect is the same whether the gift over be to B or to the whole issue A and B, A being extinguished. We are speaking of course of the effect so far as the actual enjoyment of the estate is concerned, which is what the testator is considering, and not of the legal effect, which may be different by reason of the law regarding estates in remainder as vested and capable of being dealt with in the same manner as estates in possession. It need hardly be added that the way in which the law may operate upon estates by enabling entails to be cut off, or in other respects, is to be disregarded in construing wills, for which many authorities were cited at the bar.

It was noticed that in the common use of the word "other" it has two meanings, one being "different from," corresponding with the French "autre," and the other being "additional" or "in addition to." The latter is the proper sense here, and the real meaning of the words "other issue of my body" is to add to the specified issue all that which remains, and so comprise and include it in the limitation. It may appear a paradox to say that "all my other issue" has the same meaning as "all my issue," but in reality the two things are the same when there is no issue existing except the other issue, and in that event both expressions have the same meaning.

The learned counsel for the defendant put by way of illustration a case which raises really the same question as the present, but in a simpler form, and clear of the peculiarity of *Mandeville's Case.* (1)

A devise to A for life and to his first son in tail male, and in default of all other issue of A, to a stranger in fee. Would it not be clear in that case that the estate was not to go over except upon a failure of all the issue of A? and would the word "other" be considered sufficiently definite and important in its meaning to prevent an estate in tail general in remainder in A, after failure of all the male issue of A's eldest son, upon the authority of *Stanley* v. *Lennard* (2) (which is the same case without the word "other"), and a class of cases to the same effect: *Langley* v. *Baldwin* (3); *Doe* d. *Bean* v. *Halley* (4); *Parker* v. *Tootal* (5)? We think it would not, and that the word "other" is not a governing word in such a limitation.

There are some authorities to this effect, with which the learning and industry of the learned counsel for the defendant supplied us, where the word "other" was used with a similar context.

The first was that of *James* v. *Richardson.* (6) It should be noticed that the report is not of the judgment of the Court, but of Pollexfen's own argument, which seems, however, to have been adopted by the King's Bench, and afterwards by the House of Lords.

The case was a devise of an estate to a trustee during the life of A in trust to permit A to receive the rents, and the will provided, "after the death of A, I devise the estate to the heirs male of the body of A now living, and to such other heirs, males and females, as he shall hereafter happen to have of his body;" and for want of such heirs there was a devise over. A had an eldest and only son, George, alive at the making of the will and at the death of the testator. The question was, what estate George took, and it was considered he took an estate tail by force of the words, "such other heirs male and female as he shall have of his

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(1) Co. Litt. 26 b.
(2) 1 Eden, 87.
(3) 1 Eq. Abr. 185.
(4) 8 T. R. 5.
(5) 11 H. L. 143.
(6) Pollexfen, p. 457.

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body. Now George was the heir male of A, and could not take if the word "other" had the effect of excluding him, because he had been named before. The argument at page 462 is, "the word 'other' does not exclude George; it only provides for the other heirs—males that should be of another sort." And at page 463 it is said, "If lands be given to A for life, remainder to heirs male of the body of B, remainder to the other heirs of B;" in this case the heir of B takes two estates, one as "heir male" and the other as "heir general." But it is obvious he could not do this if the word "other" did not include him, though he had been named before. No doubt what has been quoted is only the argument of Pollexfen, but if it be correct it is strictly applicable to the present case, and shews that under the present will the second baronet took two estates under the will of the first baronet, an immediate estate for life, and an estate tail general in remainder upon failure of the preceding limitations. Another authority was the case of *Burchett* v. *Durdant.* (1) In that case the same will appears to have come in question, and it is said the matter was three times argued in the Exchequer Chamber; and the third resolution is to the effect that George Durdant took an estate tail by force of the words, "and to such other heirs, male and female, as he (Robert Durdant) should have of his body." This is to the same effect as Pollexfen's argument, and it was affirmed in the House of Lords; and the word "other" could not have the effect of excluding George, who was the heir male previously named.

We were also referred to a passage in Preston on Estates (vol. ii. p. 506), to shew what his opinion was of the effect of the word "other" in a limitation similar to the present. He was a man of undoubted eminence in his branch of the profession, and of great experience in the drawing of deeds and wills, and a good authority as to the meaning of particular words.

The case put by him is of a gift to "R. and K. his wife, and their heirs; to the other heirs of R., if the heirs of R. and K. should die without heirs of themselves." The remark of the writer upon this case is, "That two estates were limited, one by a special entail (that is, to the heirs of the body of R. and K.), the other a fee simple by the words 'other heirs of R.,' for the donee had declared that

(1) 2 Vent. 311.

the order of succession should, in the first place, be regulated by a reference to the joint heirs of husband and wife, and extend to and include in a secondary consideration, and under a more remote gift, *all* the heirs of the husband."

Thus the words "other heirs" include all heirs, and do not exclude the eldest son, though he would come within the previous limitation.

We will now recapitulate, in this rather complicated case, the conclusions upon the various arguments submitted to us, upon which our judgment is founded, for the reasons which have been already given.

First. The words "issue of my body," in the penultimate limitation, are to be read in the same sense as "heirs of my body."

Secondly. Having regard to the context and the whole will, we cannot read the devise "to the issue of my body" as having the effect which in an ordinary will taken by itself it might have, viz., of giving the estate, per capita, in joint tenancy among all who came within the class at the time of vesting in possession.

Thirdly. The words "all and every" do not import that all and every are to take at the same time, but are well satisfied by all taking in succession.

Fourthly. The word "other" is not to be read in the strict sense of intending to exclude those coming within the class who have been provided for before and are supposed to have failed, but rather to complete a provision for all the issue, so as to make the estates go over by force of the words at the end of the penultimate limitation, "in default of such issue," only upon failure of all the issue of the testator. And the result is that by virtue of the penultimate limitation there was, at the death of the testator, a vested remainder in the heirs of his body in tail general, to which the second baronet then became entitled. That this remainder descended to the third baronet, the grandson, and that as he was also tenant for life in possession he was qualified to execute a disentailing deed, so as to acquire the absolute disposition of the property subject to all the estates preceding the penultimate limitation.

It is only necessary to add that this estate tail, if suffered to continue until it takes effect in possession, exactly and completely gives effect to the words of the penultimate limitation, because upon failure of all the issue named in the particular limitations the persons who would take under the penultimate limitation, and the only persons who would take under it, are all and every other the issue of the body of the testator. And this is a great proof of the soundness of the conclusion, notwithstanding the objections made to the mode of arriving at it, which we have already considered.

This conclusion agrees with the recital in the disentailing deed, which was no doubt made upon mature consideration. It was admitted that the disentailing deed was properly executed and effectual in law, if the grandson was qualified to make it.

The claim of the plaintiffs, if without the disentailing deed they would have had any claim, is therefore barred, and the defendant, who claims under the disentailing deed, is entitled to the judgment of the Court.

Having come to the conclusion in the first action that the defendant is, upon the facts stated, entitled to the property, it follows that in the other actions, as the facts are the same, the defendant is also entitled to judgment.

But it seems proper to state the objections to the title set up by the plaintiffs in these actions.

In the second action, that of *Roach* v. *Blake,* the plaintiff is Eleanor Ann Roach, the only surviving daughter of Eleanor Ann who was herself the last surviving child of the second baronet, and the last tenant in tail under the specific limitations of the will. She was the heir in tail general of the body of the testator at the time when the penultimate limitation took effect in possession.

The Solicitor-General, who appeared for her, contended that she was therefore the person entitled. His argument was that the penultimate limitation was a contingent remainder, that is, contingent as to the person who was to take under it until the happening of the event, and of course his whole argument was based upon the introduction of the word "other," which caused the contingency. In addition to the answer already given, by attributing the proper sense to the word "other," and to another objection, viz., that this reading introduces a contingent remainder after so many limitations, when another reading introduces a vested remainder (always so much preferred because it enables the property to be dealt with) in addition to these objections, another objection is that though this reading provides one of the issue to take when the event happens, it makes no provision for the succession of all and every the other issue. And accordingly the Solicitor-General relied (as he was obliged to do) upon *Mandeville's Case* (1), and contended that all and every the other issue might succeed as upon a supposed entail or quasi entail in the testator to himself and the other heirs of his body (excluding certain lines of descent which would include the real heirs of his body). Cases of limited entail were put, such as the entail upon the Electress Sophia of Hanover, and the heirs of her body being Protestants, or upon a man and the heirs of his body, tenants of the manor of Dale. It is unnecessary to enlarge upon the obvious distinction between such cases (where a condition is imposed upon a person who is the real heir of the body) and the present; such a distinction might be of importance in the case of a grant or devise to the ancestor as well as to the heirs of his body. But we should certainly not extend *Mandeville's Case* (1) to such remote and contingent interests as we are now considering; or suppose the testator to be quasi tenant in tail of an estate descendible not to the heirs of his body but to some person who might at a remote period, and upon the happening of a certain event, fill the character of heir of his body, and upon the failure of his issue to some other heir of the body not easily ascertained. In the case put, the heir of the body who took as by descent, would take an entirely different estate from that of the ancestor from whom he is supposed to inherit.

In the third action, *Clennell* v. *Blake*, the claimant is Perceval Fenwick Clennell. His mother was the survivor of all the issue of the testator living at his death (other than those included in the particular limitation) and he claims either the entirety as the heir of the survivor of the issue living at the death, or his share in case the other issue are allowed to come in. His case as regards the claim to the entirety differs from the first case only in this, that he insists the distribution ought to be made among the issue at the death of the testator, and as to the share claimed, his case is the same as the first. The same objections apply quite as strongly. Distribution among the issue per capita is equally against the language and intent of the will, whether finally made at the death of the testator or modified by the introduction of other issue.

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(1) Co. Litt. 26 b.

In the fourth case, *Reed* v. *Blake*, the claimant is Francis Reed, and he claims the entirety as heir in tail of the testator at his death, all those being excluded who came within the particular limitations.

He relies upon the exclusive effect of the word "other," and the distinction between his case and the second (that of Roach) is that he claims as upon a remainder vested at the death of the testator, whereas in Roach's case the remainder is contingent as to the person to take. The same objections apply as to Roach's case, except that founded upon the construction making the remainder contingent.

It provides one person to take under the limitation, but makes no provision for all and every the other issue, except by the eccentric application of *Mandeville's Case*. (1) The following would be one of the consequences of the construction contended for by this plaintiff. If the third baronet (the grandson) had left one child, a daughter, surviving him, that daughter would clearly have been excluded from all the particular limitations. And though upon the extinction of all the male lines she would be the proper representative of the family, she would be excluded by the grandson of her great great-aunt Sarah Reed, whose issue the testator purposely excluded in the enumeration of all who were to take.

According to the construction which we put upon the will, the estate would have come to her in a regular course of descent as tenant in tail in the events which have happened.

There was a fifth case mentioned upon the argument in which the plaintiffs are the same as in the first, and which is only a different action because it is brought in respect of other property. In that case also judgment will be for the defendant.

Bramwell, B. I concur that our judgment should be for the defendant, and I agree in all the reasoning of my Brother Cleasby, except in his dealing with the word "other" in the penultimate clause. I think the testator did not intend, and has not expressed

(1) Co. Litt. 26 b.

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the intention, that any of those issue of his body before-named should take an additional estate to those he had already given them. I do not think he had so improbable a thing in view. I think he meant that for default of such issue as named, the daughters of the sons of his eldest grandson, on their default the daughters of his eldest grandson, then the daughters of the sons of his second grandson, then the daughters of his second grandson, then in the same way as to the third, fourth, and other grandsons, then the daughters of granddaughters should take in succession as purchasers, and so on according to heirship to him. This would give the estate to Mrs. Roach. But this intention is not expressed sufficiently to be carried into execution, and the only way to accomplish the testator's general or governing intent to provide for the issue of his body, is to construe the will as proposed by my Brother Cleasby. I therefore concur in his judgment, and the more readily that if the penultimate clause is not interpreted as he proposes, it is unmeaning, in which case also the defendant is entitled to judgment.

Judgment for the defendant.

Attorney for plaintiffs: *Jennings.*
Attorneys for defendant: *Gray, Johnston, & Mounsey.*

FRITH *v.* THE QUEEN.

June 10.

Petition of Right—21 & 22 *Vict.* c. 106 (*Act for the better Government of India,* 1858)—*Annexation of Province—Sovereign Power—Transfer of Debts.*

19 Eq 521

The suppliant, by petition of right, sought to recover from the Crown a debt alleged to have become due to the person whom he represented, from the Sovereign of Oude, before that province was annexed in 1856 to the territories of the East India Company:—

Held, that assuming the East India Company became liable to pay the debt by reason of the annexation of the province, the Secretary of State in Council for India, and not the Crown, was, by the provisions of the "Act for the better Government of India, 1858," the person against whom the suppliant must seek his remedy.

THIS was a petition of right whereby the suppliant, as legal personal representative of his grandfather, sought to have restored to him three several sums of money which had become due to his grandfather from the sovereign of Oude, before the annexation of that province, in 1856, to the territories of the East India Company.

Sir J. D. Coleridge, Q.C., A.G. (*Forsyth, Q.C.*, and *Macnaghten* with him) objected that the suppliant had misconceived his remedy, and that if he had one, it was against the Secretary of State in Council for India. He relied on 21 & 22 Vict. c. 106, ss. 65, 67, and 68. (1)

Manisty, Q.C. (*J. D. Bell* and *Morgan Howard* with him), for the suppliant. The East India Company took possession of Oude as a sovereign power, and at the same time, according to the law of nations, became liable to pay the public debts and liabilities of the annexed province. Assuming, therefore, for the present purpose that the sovereign power in Oude was justly indebted to the grandfather of the suppliant, that debt was transferred in 1856 to the East India Company. But it could not have been sued for either in England or India. It was an obligation incapable of being enforced, either against the King of Oude or the company, by means of the ordinary tribunals. Then, in 1858, the Crown succeeded the company and became the transferee of this debt, which, as against the Crown, can be enforced by petition of right. The provisions of 21 & 22 Vict. c. 106, as to suing the Secretary of State, do not apply, because no proceeding, either at law or in equity, would have been maintainable against the company. The Secretary of State is only put in the place of the company as a body corporate. The rights and liabilities of the company as a sovereign power devolve, not upon him, but upon Her Majesty. It may be that the suppliant may find a difficulty in realizing the fruit of a judgment in his favour, but that is not a consideration which at the present stage should have any weight.

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(1) By 21 & 22 Vict. c. 106 (An Act for the better Government of India), the territories of the East India Company were transferred to Her Majesty, and it was thereby enacted (s. 65) that the Secretary of State in Council should and might sue and be sued, as well in India as in England, by the name of the Secretary of State in Council as a body corporate, and that all persons should and might have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State as they could have done against the company, and that the property and effects vested by the Act in Her Majesty for the purposes of the government of India, or acquired for those purposes, should be subject and liable to the same judgments and executions as they would, while vested in the company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the company. Sect. 67 enacted that all treaties made by the company should be binding on Her Majesty, and all contracts, covenants, liabilities and engagements of the company made, incurred, or entered into before the commencement of the Act, might be enforced by and against the Secretary of State in Council, in like manner and in the same courts as they might have been by and against the company if the Act had not been passed. By s. 68 it was enacted that all such liabilities, and costs and damages in respect thereof, should be satisfied and paid out of the revenues of India.

KELLY, C.B. I am of opinion that the Crown is entitled to our judgment. Assuming that the allegations in the petition as to the original liability of the Sovereign of Oude are all correct, and also that upon the annexation of that province, in 1856, to the territories of the East India Company, the liability passed to the company, the objection taken by the Attorney-General appears to me to be fatal. For whatever the liabilities of the company were, they were all transferred by the Act of 1858, not to Her Majesty, but to the Secretary of State in Council for India, and against him the suppliant's remedy, if he have a remedy, must be. The terms of the Act are clear; but it is an additional reason in favour of this view that if the contention of Mr. Manisty were well founded, the judgment which the suppliant would obtain would have to be satisfied, not out of the revenues of India, but out of the public funds of this country.

19 Eq 526

It is objected that no liability capable of being judicially enforced was incurred by the East India Company, and therefore that none was transferred by the Act of 1858 to the Secretary of State. But I cannot assent to this argument. If the law be—as for the present purpose I assume it is—that by annexation the debt and liabilities of Oude passed to the East India Company, it cannot be but that some right of action against the company existed; and that right of action must now be enforced, not by petition of right, but against the Secretary of State. The suppliant has mistaken his remedy, and the preliminary objection taken by the Attorney-General must prevail.

MARTIN, B. I am of the same opinion. The debt in respect of

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19 Eq 527

which this petition is presented was one which, I will assume, passed in the year 1856 to the East India Company, and I think an action could have been maintained against that company in this country, and probably in India also. I have no doubt that in some way or other they could have been made liable. That being so, the remedy must now be taken, under the Act of 1858, against the Secretary of State.

BRAMWELL, B. I am of the same opinion. It is manifest that upon the assumption that the East India Company were liable for this claim, and that they could have been sued for it, the suppliant is out of court. But Mr. Manisty puts the case thus:—The King of Oude was a debtor, but there was no way of suing him. Then the East India Company became transferees of the debt, but they owed the money, not as an English corporation, but as a sovereign power, and there were no means of suing them in respect of it either in England or India, though they would have been liable to be sued upon contracts made by them as a corporation. The consequence was that as regards the present claim there was an unenforcible obligation, to which the Queen has succeeded, and which has now become enforcible by the machinery of a petition of right.

Now, I confess this argument seems to me to be very plausible, but I do not think we can put the case in this abstract way, because, independently of the general considerations which make it highly improbable that there should have been legislation compelling the people of this country to pay the debts of the East India Company, I cannot see why, on such principles, we might not be made liable for the whole Indian debt just as much as for this debt. We must, in my opinion, look at the Act of 1858 as a whole; and I think it manifest that whilst it transferred the sovereignty of India to the Crown, it did not transfer the obligation to pay previously unenforcible debts. If these were transferred at all, they were transferred to the Secretary of State. Moreover, looking at the matter practically, it is perfectly plain that the revenues of England cannot be liable to pay this claim, and that a judgment for the suppliant would be a barren one. I agree, therefore, that the judgment of the Court must be for the Crown.

Channell, B. I also think that the suppliant has no ground for his petition. The claim he makes is one which, if he can enforce it at all, he must enforce against the Secretary of State; and if he should obtain judgment, he must look, under the express language of the Act of 1858, to the revenues of India for payment.

Judgment for the Crown.

Attorney for suppliant: *John Rae.*
Attorney for Crown: *The Solicitor to the India Office.*

CURTIS, Appellant *v.* EMBERY, Respondent.

June 22.

9 QB. 283
4 CD 494

Construction — Hackney Carriage—Street—Towns Police Clauses Act, 1847 (10 & 11 *Vict.* c. 89) ss. 3, 38—*Public Health Act,* 1848 (11 & 12 *Vict.* c. 63) s. 2.

In a district to which the Local Government Act, 1858, applied, a piece of ground adjoining a railway station, and belonging to the company, metalled and separated from the highway only by a gutter, was used as an approach to the railway station. Private carriages were allowed to stand there, but no hackney or public carriages, except those of the appellant; the appellant, by agreement with the company, having the sole right of standing carriages there for the purpose of plying for hire. The appellant having been convicted in a penalty for allowing his carriages to ply there for hire without a licence:—

Held, that the place was not a "street" within the meaning of s. 3 of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), for that the places included by that section in the word "street" were places over which the public had a right of passage; and that the conviction was therefore wrong.

Case stated by the Justices of Kent under 20 & 21 Vict. c. 43. The appellant was summoned under s. 45 of the Towns Police Clauses Act, 1847, for "permitting his carriage to be used as a hackney carriage plying for hire" within the limits of the Tunbridge Wells Improvement Act, without a licence.

The Local Government Act, 1858 (20 & 21 Vict. c. 98), had been adopted in Tunbridge Wells. By virtue of orders made and confirmed under s. 77 of that Act, and by virtue of s. 20, all provisions of a local Act formerly in force there relating to hackney carriages had been repealed; but by s. 44, the provisions of the Towns Police Clauses Act, 1847, with respect to hackney carriages, are incorporated in the Local Government Act.

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By the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89) s. 45, a penalty is imposed on the proprietor of any carriage who "permits the same to be used as a hackney carriage plying for hire" without having obtained a licence under s. 37.

Sect. 38 defines a "hackney carriage" as "every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any *street* within the prescribed distance."

By s. 3 "street" is to "extend to and include any road, square, court, alley, and thoroughfare, or public passage within the limits of the special Act."

By s. 2 of the Public Health Act, 1848 (11 & 12 Vict. c. 63, incorporated with the Local Government Act, 1858, by s. 4), the word "street" shall "apply to and include any highway (not being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and the parts of any such highway, road, bridge, lane, footway, square, court, alley, or passage, within the limits of any district."

It was admitted that the carriage in question (being unlicensed) had plied for hire with the appellant's permission, but it was contended that it did not come within the definition of a hackney carriage in s. 38 of the Towns Police Clauses Act, 1847, inasmuch as it was not "standing or plying for hire in any *street*." The question therefore was, whether the place where it was standing was a "street" within the definition in s. 3 of the Towns Police Clauses Act, 1847; or, if that section was applicable, s. 2 of the Public Health Act, 1848 (11 & 12 Vict. c. 63).

The place where the carriage was standing is a piece of ground belonging to the South Eastern Railway Company, and situated between the public highway and the company's station. It is known to the police as the railway company's ground; it is metalled, and is only separated from the highway by a gutter. It is used as an approach to the railway station, and has always been kept in repair as a carriage-way by the company, who have permitted private carriages to stand upon it when waiting the arrival of the trains, but have forbidden hackney or public carriages, other than those of the appellant, to enter on the ground for the purpose of plying for hire, and have prevented outside porters from standing thereon.

By agreement with the appellant, who is an hotel-keeper, the company have during the last seven years allowed him the sole right of standing carriages there for the purpose of being hired by railway passengers.

There was a separate approach for carriages to the other side of the station, which was inclosed. (1)

The justices were of opinion that the place in question was a "street," and convicted the appellant.

Field, Q.C. (*Murch* with him), for the appellants, contended that the Public Health Act, 1848, s. 2, did not apply, but that if it did, the place in question, being private property, was not a "street" within the meaning of either Act, and cited *Case* v. *Storey* (2) and *Skinner* v. *Usher* (3), decided under 1 & 2 Wm. 4, c. 22, and 6 & 7 Vict. c. 86, and distinguished *Clarke* v. *Stanford* (4), and *Allen* v. *Tunbridge* (5), as decided under the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 4, which only uses the words "plying for hire," but not the words "in any street or place."

R. E. Turner, for the respondent, contended that the present case was more analogous to the latter than to the former class of cases; that the place in question was at least a "road," and if so, then a "street" within the Towns Police Clauses Act, 1847, s. 3; and he referred to 5 & 6 Wm. 4, c. 50, s. 23, as using the word "road" in reference to a private way.

Field, Q.C., was not called on to reply.

BRAMWELL, B. This conviction must be quashed. The reason of the thing, the words of the statute, and the authorities are all against it. The reason of this legislation is to protect the public who employ carriages plying for hire, where there is nothing to control the condition of the carriages and the conduct of the driver but his own discretion. But there was no intention to protect

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(1) This fact was not stated in the case, but was admitted during the argument.

(2) Law Rep. 4 Ex. 319.

(3) Law Rep. 7 Q. B. 423.

(4) Law Rep. 6 Q. B. 357.

(5) Law Rep. 6 C. P. 481.

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them where the carriages and drivers are subject to the management of responsible persons, within whose private premises they stand to carry on their business. Therefore I think the legislature did not mean to include carriages plying for hire in the premises of the railway company, or where (as may happen) they ply for hire within the premises of the owner of the carriage.

It is said, however, that the place where this carriage was plying for hire was a road. But I think it was not a road nor any part of a road. A road as used in the Act of Parliament must manifestly mean a public road, a road which the public have a right to use for passage. This is so with all the places mentioned. They are all places of passage, and are all meant to be public. Otherwise a square which was not public, that is, the inclosure of a square, would be within the Act. I cannot think this is so; and am of opinion that the road spoken of must be a road over which the public have rights; and when we consider that the effect of affirming this conviction would be to make the Act apply to one platform and not to the other; and that the railway company might frustrate its effect by putting up a fence between their private property and the highway, it seems impossible to hold that the case is within the statute. Lastly, the decision in *Case* v. *Storey* (1) is in point for the appellant.

CLEASBY, B. I am of the same opinion. The word "street" is dealt with in the interpretation clause of the Act of Parliament as extending to and including "any *road,* square, court, alley, and thoroughfare, or public passage," and it is said that this is a road. I think it is not. I will not attempt to define the definition in the interpretation clause; nor indeed do I know that I could define what a road is. But I will consider the facts to see if the place in question is within the meaning of the words as there used. [The learned judge referred to the statements of the case, and proceeded:—] The only passage which aids the contention that this is a road, is that which says it is used as an approach to the station. Now it is not contended that if this piece of land were inclosed it would be a road. But it appears that the railway company are entitled to prevent its being used by any person, and actually do prevent its being so used by all other persons; the use of it by the appellant is a special privilege granted to him. I can only say that these facts do not make the place a "road" in any sense within the Act.

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(1) Law Rep. 4 Ex. 319.

Judgment for the appellant.

Attorney for appellant: *E. P. Cearns.*
Attorneys for respondent: *Davidson, Carr, & Co.*

KENDALL *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

June 10.

Carrier—Railway Company—Animals—Accident due to inherent Vice.

8 QB 188
1 CPD 2C
424
439,44

The plaintiff delivered to the defendants a horse to be carried by their railway. At the end of the journey the horse was found to be injured. No accident had happened to the train, and the defendants were guilty of no negligence. The cause of the injuries was unknown, except that from their nature they appeared to have been caused by the horse getting down upon the floor of the horse-box. The horse was quiet, and accustomed to travel by rail. In an action brought to recover damages for these injuries:—

Held, by the Court, drawing inferences of fact (Martin and Bramwell, BB., Pigott, B., dissenting), that the defendants were not liable, since it was to be inferred that the injuries resulted from the proper vice of the horse.

THIS was an action to recover damages for injuries sustained by the plaintiff's horse whilst it was being carried by the defendants on their railway.

The cause was tried before Martin, B., at Guildhall, at the sittings after Hilary Term, 1872. It appeared that the horse was taken, saddled and bridled, to the defendants' station at Waterloo, and was there delivered to the defendants to be carried to Ewell. It was attempted to be shewn that the defendants' servants were guilty of negligence in not fastening up the stirrups; but as the plaintiff was himself present when the horse was put into the box, and had, after at first objecting, acquiesced in the stirrups being allowed to hang down, and as evidence was also given that the course adopted was usual and proper, that contention was abandoned.

No accident happened to the train, nor anything likely to alarm the horse, which was proved to be a quiet animal and accustomed

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to travel by rail; but at the end of the journey the horse was found to have sustained considerable injuries; and it was in respect of these injuries that the action was brought.

An attempt was made by the defendants to take advantage of a condition contained in the contract of carriage; but this was abandoned at the trial.

A verdict was entered for the plaintiff for 31*l.* 10*s.*; leave being reserved to the defendants to move to enter the verdict for them, the Court to have power to draw inferences of fact. A rule having been obtained accordingly,

April 27. *Lloyd, Q.C.*, and *Graham*, shewed cause. The defendants received from the plaintiff for carriage a chattel which was sound; they delivered it up to the plaintiff in a damaged condition; they are therefore liable unless they can bring themselves within some of the exceptions to a carrier's liability. That they are common carriers of cattle cannot now be questioned; they are therefore insurers, and it does not lie on the plaintiff to prove negligence on their part; the onus is on them to discharge themselves from the primâ facie liability. If the cause of the mischief is to be inquired into, it was probably that the stirrups were left hanging down; if so, it is like injury caused by bad stowage, for it was the defendants' duty to see that the horse was placed in the box in such a manner as to travel safely.

James, Q.C., *Wood, Q.C.*, and *Mangles*, in support of the rule. Railway companies are not common carriers of animals: per Pollock, C.B., and Martin, B., in *Pardington* v. *South Wales Ry. Co.* (1), and Erle, J., in *M'Manus* v. *Lancashire and Yorkshire Ry. Co.* (2), referring to *Carr* v. *Lancashire and Yorkshire Ry. Co.*, per Parke, B. (3)

[MARTIN, B. That is my own opinion, but the point has been settled the other way.

BRAMWELL, B., referred to *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (4)]

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(1) 1 H. & N. at p. 396; 26 L. J. (Ex.) at p. 108.

(2) 4 H. & N. at p. 347; 28 L. J. (Ex.) at p. 358. 5 Jur N.S. 651

(3) 7 Ex. at p. 711; 21 L. J. (Ex.) at p. 262.

(4) 2 B. & S. 122, 152; 29 L. J. (Q.B.) 209; 31 L. J. (Q.B.) 113. 6 Jur N S 954

Even assuming them to be common carriers, they are not liable if the injury is caused by " an occurrence incident to the carriage of animals in a railroad car, and which the defendants could not by the exercise of diligence and care have prevented:" *Clarke* v. *Rochester and Syracuse Ry. Co.* (1) Such accidents as are due to the innate properties of the animals carried can never be fully guarded against; they resemble the spontaneous ignition or explosion of combustible materials, or the fermentation of liquors. They are not therefore within the reason of the rule which makes carriers insurers, and the carriers are not liable if they have exercised "that degree of care which the nature of the property requires:" *Smith* v. *New Haven and Northampton Ry. Co.* (2); *Paxton* v. *North British Ry. Co.* (3); Story on Bailments, ss. 492 a, and 576; Angell on Carriers, s. 214 a. Now, whatever was the primary cause of the injuries to the horse, it is clear that they were immediately caused by his kicking and struggling; and there is nothing to shew that his doing so was caused by any act or neglect of the defendants. They cannot therefore be held liable for what must be assumed to be the result of his natural unruliness.

Cur. adv. vult.

June 10. The following judgments were delivered:—

PIGOTT, B. The plaintiff delivered to the defendants a horse in good health to be carried to Ewell by their railway. There was a condition in the contract in the defendants' behalf, viz., that if any injury happened to the horse, in course of transit, by kicking or plunging, they were not to be liable. At the journey's end the animal was found to have sustained severe injuries, such as a cut on the forearm and cuts (several) on the hocks, besides a dislocated fetlock joint of the hind leg.

The evidence at the trial shewed that when the plaintiff delivered him to the porter at the station there was a saddle on the horse and the stirrups were hanging down (as if for riding); that he suggested to the porter to draw them up to the top of the stirrup leathers, but the latter said they would be safer as they were, and in that

(1) 4 Kernan R. 570, at p. 575.
(2) 12 Allen R. 531, at p. 534.
(3) 9 Sess. Ca. (3rd series) 50.

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state the horse was put into the box. A guard proved that there was no accident to the train, and that nothing wrong was heard in the box during the journey. On the other hand, the horse was shewn to be a quiet animal and accustomed to railway travelling, and there were no signs of fresh kicking, by splintered wood or otherwise, in the box. There was nothing except the nature of the injuries themselves to shew how they were caused.

The defendants at the trial gave up their exception under the special contract, and (as I think) properly, there being nothing to shew that kicking or plunging (which I construe to mean, from vice or freshness) was the primary cause of these injuries. The Court is to draw inferences of fact, and I infer (there being no negligence on either side) that the animal either was thrown or got down in the box, and in struggling to get up again received the injuries in question. In my opinion, the cut on the forearm was clearly caused by its lying on the stirrup, and the injuries on hocks and fetlock by struggling and kicking on the floor of the box. It was the result of some accident or casualty, without evidence to shew how caused.

The law of carriers, I apprehend, is clearly this: that in the absence of any special contract they undertake to carry safely, and they insure against and bear the risks of all casualties of the transit except such as result from vis major, i. e., acts of nature (otherwise termed acts of God) and the Queen's enemies; and that since the case of *M'Manus* v. *Lancashire and Yorkshire Ry. Co.* (1) there is in this respect no distinction between live animals and other ordinary merchandise. In *Stuart* v. *Crawley* (2) a dog was delivered to the defendant, in a string, and during the transit the dog escaped, but the defendant was held liable, Lord Ellenborough saying that, "After a complete delivery to the defendant he became responsible for the security of the dog; the property then remained at the risk of the defendant, and he was bound to lock him up or to take other proper means to secure him."

The present case is thus reduced to one of onus of proof, and upon whom is such onus cast? for it can be but purely speculative how this particular mischief occurred. There may have been an accidental jerk at a curve of the line, or a jolt of the train by sudden stoppage; or, on the other hand, possibly (though there is no evidence of it) the animal may have been the cause of its own injuries by some intrinsic propensity of its own nature. In this state of things it seems to me only reasonable that the carrier, who has the sole control of the article, and who alone can know, and certainly has the means of knowing, what has occurred—which the sender of goods has not—should, if he rely upon any exception to his common law liability, shew by affirmative proof that the case is brought within the exception. This the present defendants have failed to do, and their liability to insure against a casualty of the journey is unremoved. Therefore I think the plaintiff is entitled to recover.

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(1) 4 H. & N. 327; 28 L. J. (Ex.) 358.
5 Jur NS 651

(2) 2 Stark. 323.

BRAMWELL, B. There is no doubt in this case that the horse was the immediate cause of its own injuries. That is to say, no person got into the box and injured it. It slipped, or fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, "its proper vice," that is to say, from fright, or temper, or struggling to keep its legs, the defendants are not liable. But if it so hurt itself from the defendants' negligence, or any misfortune happening to the train, though not through any negligence of the defendants, as, for instance, from the horse-box leaving the line owing to some obstruction maliciously put on it, then the defendants would, as insurers, be liable. If perishable articles, say soft fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable. Since this was written, the case of the *Great Western Ry. Co.* v. *Blower* (1) has been decided in the Common Pleas to this effect. Now it might be a question on whom, in such a case as the present, the burthen of proof lay: on the carrier or his employer? But in the actual case each party has given evidence. The defendants' witnesses have sworn that the train proceeded on the journey without disturbance

(1) Law Rep. 7 C. P.

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or interruption, and that there was nothing to excite the horse to do what he did to his own damage, no cause of the mischief, except his own inherent disposition. If this is so, the defendants are not liable. On the other hand, the plaintiff's witnesses have shewn that the horse was quiet, used to railway travelling, and therefore they say there must have been something extraordinary to excite the animal. This is a question of fact, properly for a jury, but referred to us. If I am to decide it, I find for the defendants. The evidence of the plaintiff makes it *improbable* it was the "proper vice" of the horse; the evidence of the defendants makes it impossible it was otherwise. It will be observed I take no notice of the saddle and stirrups being on the horse as described. In the first place, I am satisfied they were not the exciting cause of the mischief. In the next place, it appears that it was proper to carry the horse so caparisoned; and if so, and if this horse was affected by their being there, it is his own inherent and peculiar disposition that made him so—his "proper vice." At all events, I cannot find for the plaintiff on this ground. I cannot trace the injury to this cause. Nor do I notice the clause as to the company not being liable for damage arising from certain conduct of the horse, kicking, &c., because I understand Martin, B., to report that the defendants did not shew that the damage arose thus. In the result I think this rule should be made absolute.

MARTIN, B. This is a case of great difficulty, but, after much hesitation, I concur with my Brother Bramwell.

Rule Absolute

Attorneys for plaintiff: *Hargrove, Fowler, & Blunt.*

Attorney for defendants: *Crombie.*

EADON AND OTHERS *v.* JEFFCOCK AND OTHERS.

1872
June 11.

Mines—Injury to Surface—Subsidence.

8 C.P. 341
10 Ch 399
400,
6 App Cas
463
6 App Ca
809
22 Ch D 87
8 App Cas
842

In 1840 a bed of coal, called the High Hazle Bed, was demised, with working powers, to persons from whom the defendants took by assignment. The lessees were to pay a minimum rent of 200*l.* as for 2*a.* 1*r.* 16*p.*, and a further yearly rent at the rate of 85*l.* per acre for coal actually got beyond the 2*a.* 1*r.* 16*p.*, "including all ribs and pillars left in working the said coal, *except* the pillars for the support of the shafts, the pillars between the deep and counter level, the pillars all round the estate, and the pillars under the homestead and farm buildings." These pillars, of specified dimensions, the lessees bound themselves to leave "during the whole of the term," and they also covenanted to work the mines "according to the best of their judgment, skill, and discretion, in a good and workmanlike manner."

In 1857 the assignee of the lessor conveyed part of the land within which the mine lay to persons from whom the plaintiffs took with notice, reserving to the grantor the High Hazle Bed (except a small portion specified), and "the mines, veins, and bed of coal, fire clay, and other clay, stone and other minerals lying under the said bed called the High Hazle Bed," with powers to the grantor, his heirs and assigns, and his and their tenants and lessees, to be exercised "from and after the expiration of the term" for "carrying on the works of the mine, and getting and carrying away the said fire-clay, &c.," so reserved; and also reserving to the grantor the coal rent under the lease of 1840, with the necessary powers. Provision was made for rent for land used or occupied by the grantor for the purposes of the mine, and for compensation for buildings required or removed for that purpose, and for surface damage to the land; but it was specially provided that the grantor, his heirs or assigns, tenants or lessees, should not be liable for any damage caused to buildings which should thereafter be erected on the land conveyed, by the sinking of the land through mining operations in getting the "coal, clay, stone and other minerals hereby excepted and removed."

The pillars specified in the lease of 1840 were left; and the defendants worked according to the usual course of mining in the district; but their workings caused a subsidence, which injured the land of the plaintiffs and buildings erected since 1857. The land would have subsided without the buildings.

Held (by Martin and Cleasby, BB.; Bramwell, B., doubting), that, it appearing by the lease of 1840 to be the intention of the parties that all the coal should be removed, except the specified pillars, and the defendants having worked the mine in a proper manner, they were not liable for the injury.

By Bramwell, B., that so far as concerned the houses, the proviso in the conveyance of 1857 protected the defendants from liability, notwithstanding that the lease under which they held was antecedent to that deed.

Dugdale v. *Robertson* (3 K. & J. 695)(a), and *Taylor* v. *Shafto* (8 B. & S. 228), commented on.

SPECIAL CASE stated in an action brought to recover damages for injury done to land and houses of the plaintiffs, situated at

(a) S C 3 Jur N.S. 667

Carbrook, near Sheffield, by subsidence caused by the mining operations of the defendants.

The defendants were assignees of a lease, dated the 24th of June, 1840, by which T. H. S. Sotheron, being seised in fee of the Carbrook estate, demised to B. Hornsfield, J. Wilson, W. Jeffcock, and T. Dunn, for a term of thirty-one years from the preceding 1st of June, the High Hazle Bed of coal, lying under lands forming part of the estate, and containing 108*a.* 3*r.* 1*p.*; with liberty to enter upon and occupy the said lands so far as necessary for carrying on the works of the mine, or exercising the powers granted by the lease; giving notice and making compensation, as therein mentioned, "for all injury or damage to be done to buildings, and to the corn or other crops then standing or growing thereon; and with liberty to open, sink, dig, &c., any pits, shafts, adits, &c., in and upon the said lands and hereditaments, and on any part thereof (with certain exception of garden ground), "doing thereby as little damage as may be." And to win, get, and dispose of "all that the said mine or bed of coal," and to make and dispose of coke; and with liberty to raise clay, brick earth, loam, sand, fire-clay, or stone, in any convenient part or parts of the lands, and to make the same into bricks, &c., for the buildings and works of the mine, and to erect engines, huts, and other erections and machines, and generally to do all other acts necessary for working the mine. To have and hold the said mines, &c., for the term of thirty-one years, "yielding and paying therefor, yearly and every year during the said term of thirty-one years, unto the said T. H. S. Sotheron, his heirs and assigns, the certain yearly rent or sum of 200*l.*, as for 2*a.* 1*r.* 16*p.* of the said mine or bed of coal, by two half-yearly payments in each year, on the 1st day of December and the 1st day of June, without any deduction for taxes or otherwise, the first payment thereof to be made on the 1st day of December next; the same rent to be payable whether the said B. Hornsfield, J. Wilson, W. Jeffcock, and T. Dunn, their executors, administrators or assigns, shall get that quantity of coal or not; and also yielding and paying to the said T. H. S. Sotheron, his heirs or assigns (over and above the said certain yearly rent of 200*l.*) the sum of 85*l.* for every statute acre, and so in proportion for any greater or less quantity than a statute acre of the said mine or bed of coal hereinbefore demised, which shall be got in each year of the said term over and above the said 2*a.* 1*r.* 16*p.*, including all ribs and pillars left in working the said coal, except the pillars for the support of the shafts, the pillars between the deep and counter level, the pillars all round the estate, and the pillars under the homestead and farm buildings hereinafter severally mentioned; and also yielding and paying yearly rent for surface land occupied under the powers of the lease, at the rate of 4*l.* an acre; and, on the last day but one of the term, for surface land not then levelled fit for tillage, a sum at the rate of 30*l.* an acre.

It was provided that rent should be remitted in the event of fault or failure of the coal occurring; "and further, that in working the said mines the following pillars shall be left by the said B. Hornsfield, J. Wilson, W. Jeffcock, and T. Dunn, their executors, &c., during the whole of the said term hereby demised in the said mine (that is to say), a pillar for the support of the shafts, a pillar of four yards in breadth at the least between the deep and counter level of the said mines, a pillar of ten yards in breadth at the least all round the estate, and a pillar of one acre at least under the homestead and farm buildings."

The lease contained powers to remove machinery, &c., and covenants by the lessees to pay rent, rates, and taxes, to fence the lands used by them, to work the mines "according to the best of their judgment, skill, and discretion, in a good and workmanlike manner," and to sink the engine-shaft as therein mentioned, to fill up and level (on request) useless shafts, to level the ground adjacent to shafts or connected therewith, fit for tillage, according to the custom of the country, and to allow inspection; and further, that the lessees, &c., would from time to time, upon demand, "pay the several occupiers and tenants for the time being of the said lands under which the said mines hereby demised are situate, reasonable satisfaction for any damage that may be caused or occasioned on their respective lands or the crops growing thereupon, by working the said mine, or carrying or not carrying away the produce thereof, or any materials to or from the said premises, the amount of such payment or satisfaction in case of dispute, to be settled by reference to arbitration."

The lease also contained a covenant against assignment, powers

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of distress and re-entry for non-payment of rent, arbitration clauses, and the usual lessor's covenants for title.

The plaintiffs derived title as follows:—

By a deed of the 9th of June, 1847, T. H. S. Sotheron conveyed to Samuel Roberts the whole of the Carbrook Hall estate, with the mines and minerals under the same, subject to the lease of 1840.

By a deed of the 27th of April, 1857, made between, 1. S. Roberts, 2. H. Briggs, and 3. H. Briggs, G. Adsett, J. Williamson, and W. Siddall (after reciting the conveyance of 1847, and the lease of 1840), S. Roberts appointed and conveyed to the parties of the third part, their heirs and assigns, Carbrook Hall and certain pieces of land, containing 52*a.* 1*r.* 34*p.*, and forming part of the Carbrook Hall estate, together with (inter alia) all "mines and minerals other than the veins and beds of coal, clay, and other minerals hereinafter excepted," and all rights, &c., "save and except as hereinafter reserved;" reserving to the lord of the manor of Attercliffe all rights to mines, ores, minerals, or coal, in or under certain lands allotted under an Inclosure Act. "And also excepted and reserving to the said S. Roberts, his heirs and assigns, the said mine, vein, bed, or stratum of coal called the High Hazle Bed, part of which is demised by the said recited indenture of lease of the 24th of June, 1840, except out of this exception and reservation so much thereof as is under the part coloured dark green on the said plan, and which part contains one acre, or thereabouts; and also, excepting and reserving the mines, veins, and beds of coal, fire-clay, and other clay, stone, and other minerals, lying under the said bed, called the High Hazle Bed, as (sic) are within and under the said closes and other hereditaments hereinbefore described granted and conveyed;" with liberty to the said S. Roberts, his heirs and assigns, and his and their tenants and lessees, miners, &c., "from and after the expiration of the term" granted by the lease of 1840, to enter upon and occupy so much of the lands "under which the excepted coals and minerals so reserved to the said S. Roberts" lay, as might be "necessary for the carrying on the works of the said mines, and getting and carrying away the said fire-clay and other clay, stone and other minerals, lying under the said bed of coal called the High Hazle Bed, or for exercising all or any of the powers and authorities to him or them excepted or reserved by these presents;" and also, after the expiration of the said term, to open pits, &c., in and upon the lands "under which the said coal and minerals so reserved" lay, doing thereby as little damage as may be; and to get and dispose of "all the said hereinbefore excepted mines, veins, beds, or stratum of coal, fire-clay, and other clay, stone, and other minerals under the said bed of coal called the High Hazle Bed;" and to set up such engines, &c., on the lands under which the beds of coal, &c., so reserved lay, as might be necessary for getting "so much of the veins or beds of coal, fire-clay and other clay, stones, and other minerals as are hereinbefore reserved to the said S. Roberts;" and to do all acts necessary for bringing, placing, &c.," all such coal, fire-clay, and other clay, stone, and other minerals, as is hereinbefore reserved to the said S. Roberts, &c.; the said S. Roberts, his heirs and assigns, well and truly performing, fulfilling, and keeping the several covenants and agreements hereinafter on his and their part contained with reference to the said beds of coal and the several powers, liberties, privileges, and authorities in and by these presents excepted, reserved, or given."

To have and to hold the said hereditaments, with the appurtenances (except and reserved as aforesaid, and also reserving to the said S. Roberts, his heirs and assigns the coal-rent reserved by the said lease, and also all powers, privileges, and remedies for the recovery thereof, as also all other powers, privileges, and authorities which the said S. Roberts, his heirs or assigns, would have been entitled to exercise or carry into execution with reference to the said lease, in case these presents had not been executed, and subject to the lease) unto H. Briggs, G. Adsett, J. Williamson, and W. Siddall, their heirs and assigns.

Covenants by S. Roberts that he had good right to convey, "subject and reserved as aforesaid;" for quiet enjoyment, "except in reference to the said lease, and the beds of coal, fire-clay, and other clay, stone, and other minerals, rights, liberties, and privileges hereby excepted or reserved;" free from incumbrances and for further assurance; and further, that, except under the powers contained in, or reserved with reference to, the lease of 1840, he, his heirs or assigns, or his or their lessee or lessees, miners, &c.,

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would not enter upon the land under which the beds of coal, &c., so reserved lay, without giving one month's notice; and that he, his heirs and assigns, would make reasonable satisfaction and compensation to H. Briggs, G. Adsett, J. Williamson, and W. Siddall, their heirs and assigns, and to the tenants or occupiers for the time being of the lands for all injury or damage to be done to buildings then erected or which might thereafter be erected on the land conveyed, which might be required, taken down, or removed by S. Roberts, his heirs and assigns, or his or their tenants or lessees, for the purpose of opening, &c., any pits, &c., as also for all injury or damage to the corn and other crops for the time being standing, growing, or being thereon, by carrying on the works of the mines, getting the said fire-clay and other clay, stone, and other minerals, or by exercising all or any of the powers and authorities thereby excepted, reserved, or given, except as aftermentioned.

"Provided, nevertheless, and it is hereby expressly agreed and declared by and between the parties to these presents, that the said S. Roberts, his heirs or assigns, tenants or lessees, shall not be liable or responsible to the said H. Briggs, G. Adsett, J. Williamson, and W. Siddall, their heirs or assigns, tenants or lessees, or to any other person or persons whomsoever, for any damage, injury, or loss which may be caused, occasioned, or sustained to any dwelling-house or dwelling-houses, or other erections or buildings, which shall hereafter be erected or built upon the land or ground and hereditaments hereby conveyed or intended so to be, or upon any part or parts thereof, by or in consequence, or which can be attributed or attributable to the settling, sinking, or lowering of the said land or ground and hereditaments, or any part or parts thereof, which may be caused or occasioned by the opening, sinking, driving, working, and making any pits, shafts, or other works, or to the winning, getting, working, and raising the coal, clay, stone, and other minerals hereby excepted and reserved." There were further covenants by Roberts for payment of surface-rent, restoring the surface, payment of taxes, fencing of works, filling up and levelling shafts, &c., similar to those contained in the lease of 1840, with powers of distress to H. Briggs, &c., and arbitration clauses.

By a deed of the 9th of April, 1860, H. Briggs, G. Adsett, J. Williamson, and W. Siddall (and their mortgagees) conveyed to Charles Robinson a portion of the land included in the deed of 1857; and on the 8th of November, 1865, Charles Robinson conveyed a portion of the land so conveyed to him to Robert White.

By building leases, dated respectively the 8th of May, 1866, and the 5th of September, 1866, Robert White demised to J. T. Hall certain portions of the land so conveyed to him for terms of 800 years; and by deeds, dated respectively the 17th of August, 1866, and the 11th of October, 1866, these leases were mortgaged by J. T. Hall to the plaintiffs. The lands and buildings comprised in these leases were the land and buildings in question.

The plaintiffs, and the several persons through whom they derived title to the land and houses in question, took with notice of the terms of the lease of 1840 and the conveyance of 1857.

The bed of coal demised by the lease of 1840, and which lay underneath the land and houses of the plaintiffs, was worked from the date of the lease, and the pillars stipulated for in the lease were and are left as thereby provided; but these pillars are not near the land and houses of the plaintiffs.

The lease became vested in the defendants in 1868, and they continued to work the demised coal under the powers contained in it. Between the 1st of May, 1868, and the commencement of the action they extended their workings under and near to the land and buildings of the plaintiffs, and by reason of such workings the land and buildings subsided and sunk, whereby the plaintiffs sustained damage.

There was nothing in the course adopted by the defendants in their workings contrary to the usual course of mining in use in the district. It would have been possible to leave pillars which would have supported the surface; but in that event the coal forming such pillars and supports must have been paid for by the defendants under the lease, and would have been lost to them.

When the lease was granted in 1840, the land under which the demised coal lay was agricultural land, without any buildings, except the homestead and farm buildings mentioned in the lease, none of which stood on the land now belonging to the plaintiffs. The buildings now on the plaintiffs' land were erected in 1865. The land would have subsided and sunk without the weight of the buildings.

The questions for the opinion of the Court were: 1. Are the defendants liable to the plaintiffs for any damages caused by the said subsidence? 2. If the defendants are so liable, are they liable for any damages caused by the subsidence to the houses of the plaintiffs? The damages (if judgment should be for the plaintiffs) to be assessed by an arbitrator.

Feb. 7. *Field, Q.C.* (*Gainsford Bruce* with him), for the plaintiffs, contended that the case fell within the rule established by *Humphries* v. *Brogden* (1); *Smart* v. *Morton* (2); *Roberts* v. *Haines* (3); *Brown* v. *Robins* (4); *Stroyan* v. *Knowles* (5); *Rowbotham* v. *Wilson* (6); *Dugdale* v. *Robertson* (7); *Proud* v. *Bates* (8); and *Duke of Buccleuch* v. *Wakefield* (9); that the owner of mines must work them so as to do no damage to the owner of the surface; and that there were no such indications of a contrary intention in the lease of 1840, as were, in *Taylor* v. *Shafto* (10), held to modify the operation of that rule. They also contended that the proviso against liability for damage to the surface contained in the deed of 1857 could not affect the liability of the defendants, who claimed under the earlier lease of 1840.

Manisty, Q.C. (*Kemplay* and *Gould* with him), for the defendants, contended that the intention of the parties to the lease of 1840 was that all the coal should be got, except the specified pillars; and that under those circumstances the defendants, working in a proper and customary way, and leaving the specified supports, were not liable for damage caused thereby: *Taylor* v. *Shafto* (10); and they also contended that the effect of the proviso in the deed of 1857 was that the purchasers under that deed took the land without the right to support, so far as concerned the excepted mines: *Rowbotham* v. *Wilson* (1).

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(1) 12 Q. B. 739; 20 L. J. (Q.B.) 10.

(2) 5 E. & B. 30; 24 L. J. (Q.B.) 260. 1 Jur N.S. 825.

(3) 6 E. & B. 643; 7 E. & B. 625; 25 L. J. (Q.B.) 353. 2 Jur N.S. 1000

(4) 4 H. & N. 186; 28 L. J. (Ex.) 250.

(5) 6 H. & N. 454; 30 L. J. (Ex.) 102.

(6) 8 H. L. C. 348; 30 L. J. (Q.B.) 49.

(7) 3 K. & J. 695. 3 Jur N.S. 687

(8) 34 L. J. (Ch.) 406. 11 Jur N.S. 441

(9) Law Rep. 4 Eq. 613; Law Rep. 4 H. L. 377.

(10) 8 B. & S. 228.

(6) & 6 Jur N.S. 965

Gainsford Bruce, in reply.

Cur. adv. vult.

June 11. The following judgments were delivered:—

CLEASBY, B. This case was argued before my Brothers Martin and Bramwell and myself, and the judgment which I am about to read is that of my Brother Martin and myself.

The question in this case is, whether the plaintiffs can recover against the defendants for damages to their houses or their land, caused by the subsidence of the latter. It must be taken as a fact in the case that the subsidence was caused by the working of the coal mines underneath by the defendants.

When the property in the soil and in the minerals underneath belongs to different persons, the general rule is, no doubt, that each must use his property so as not to injure that of the other. It does not appear to be well settled what the exact nature of the right of the owner of the soil to the support of the subjacent or adjacent minerals is. Lord Wensleydale says, in *Rowbotham* v. *Wilson* (2), "Whether the right to support given by the land below to the land of the owner of the surface when the strata belong to different persons properly is, to be called an easement, as it is by Mr. Gale in his excellent Treatise on Easements, 'a natural easement,' or, whether it is to be termed a right ex jure naturæ to that support, or whether the owner of the surface has merely a right to enjoy his own land in its natural state and condition with a right of action against the owner of the land adjoining or subjacent when the act of his neighbour does him an injury, are questions immaterial to the decision of this case, though the last proposition appears to be fully established by the judgment of the Court of Exchequer Chamber in *Bonomi* v. *Backhouse*." (3)

In many of the cases the analogy of the owners of the separate flats or stories of a house is referred to, and it places the matter in

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(1) 8 H. L. C. 348; 30 L. J. (Q.B.) 49. 6 Jur. N.S. 965.

(2) 8 H. L. C. at p. 359; 30 L. J. (Q.B.) at p. 53. 6 Jur N.S 966

(3) E. B. & E. 646; 28 L. J. (Q.B.) 378; affirmed in the House of Lords, *Backhouse* v. *Bonomi*, 9 H. L. C. 503; 34 L. J. (Q.B.) 181.

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a clear light where there has been a separate ownership of the two without its being known how they became separated, or where there has been a conveyance of the land with a reservation, or rather exception, of the mines. And in such cases we must look to those rights which by law are annexed to the property in each.

But it appears to us that this analogy does not exist where the transaction is an ordinary mining lease, which is a contract entered into between the owner of both surface and minerals, and a lessee or a licensee for the purpose of removing and making saleable minerals which form in part what is called the natural support of the soil. This is a contract made by the owner of both for his own profit, and in order that the coal may no longer lie valueless merely supporting the soil above it, but may be sold by him at a price, usually in the form of an acreage rent, which may enormously increase the value of his property.

It appears to us that outside of this contract there is no reservation of any right to support, whatever the exact nature of that right may be, but that we must look at the contract itself, and by a proper construction of it, having regard of course, as in all cases, to the subject-matter, arrive at the extent to which the owner authorizes the minerals to be removed.

In addition to the reservation of a certain acreage rent for the coal got (in the present lease 85*l.* an acre), it is an ordinary clause in such leases to have a minimum rent reserved to the lessor; that is to say, the lessee absolutely binds himself to get at least, or if not got to pay for, one or two acres or some other quantity of the coal, as the case may be (in the present lease 2*a.* 1*r.* 16*p.*) It is obvious that for such advantages as these the lessor may, at the same time that he grants to the lessee the seam of coal, expressly authorize him to take the whole of it, or to take certain parts only, or he may expressly place the lessee under certain restrictions as to the mode of working.

It strikes us very strongly that in all these cases the contract would regulate the obligations and the rights of the parties. The lessor has made the mines, and the working and removing them from under the surface, and his rights connected therewith, the subject of contract. He has dealt with his rights, whatever their nature may be, as he was at liberty to do, and he cannot afterwards revert to them as the foundation of a claim as if they were of a nature not capable of being dealt with by contract, and as if they must continue to exist jure naturæ, or under some other title.

No one would dispute that, if the lessor placed the lessee under a covenant to remove the whole of the coal in a specified manner, and to pay a royalty of so much a ton for the whole, there would in that case be no responsibility if, in consequence of this being done, the surface subsided, or that such a case need be complicated by any question whether the lessor had intended to give up his right to support. The only question would be, whether the lessee had done what the lessor authorized and placed him under covenant to do. This and other cases which may be put seem to shew that in all such transactions inter partes, the contract between them must determine what acts are lawful (as between those parties) so far as its proper construction extends to those acts.

Where there is a lease and licence to take the coal at an agreed acreage rent, with a minimum rent reserved, if the terms of the lease are that the lessee should work in a specified manner, leaving certain described supports, then if the lessee works in that manner he would only have done what he was authorized to do, and would not be responsible if the surface subsided in consequence; and the same would be the conclusion if the covenant was that he should work according to the usual mode of working coal mines in the district; or if, having placed the lessee under certain restrictions as to the working, and so made the mode of working the subject of contract, the lease made no provision as to the mode of working in general. In the latter case we think the lessee must conform to the usual and approved manner of working in the district (which would probably be the result of experience), and that if he did so he would not be responsible for the consequences.

The lessee would then know what he was about, and how to proceed. He has to conform to the matters prescribed in the lease, and to the usage, and can go on during the whole period of his lease to get the coal from the whole area leased; but if he has no guide but the necessity to avoid subsidence, he must throughout be proceeding on an experiment to ascertain how much can be got with security; and in case some partial subsidence should take

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place, we do not see whether he is to stop, or to go on, as a matter of right, from time to time perhaps causing further subsidence. We regard a mining lease not merely as a transfer of property, but as a contract under which something is to be done; and the question is, what it authorizes to be done.

If the authorities were clear, that under a mining lease the right of the owner to have the soil supported by the minerals was implicitly reserved in the absence of something which shews clearly that he gives it up, we should not offer our opinion in opposition to them.

But although there are many authorities which have settled the right to support when the soil and minerals were held under different titles, or where there has been a conveyance of the land reserving the minerals, or where the surface and minerals are severed by an award under an Inclosure Act (*Harris* v. *Ryding* (1); *Humphries* v. *Brogden* (2); *Smart* v. *Morton* (3); *Rowbotham* v. *Wilson* (4)), the cases are few where the question has arisen on a mining lease.

In the case last referred to there had been an award under an Inclosure Act which the parties interested had all executed, and Lord Wensleydale considered that the award, being so executed, might operate as a grant of a right to work the minerals.

He used (5) the following language, which seems applicable to such leases as the present: "The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed, or reserved when the surface is conveyed." And after pointing out that some right to get the minerals is incident to the grant or reservation where there is no express limitation to get them, he adds: "But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired, and then the only question would be as to the construction of that deed, which may vary in each case."

The case of *Dugdale* v. *Robertson* (6) was much relied on by the plaintiffs. In that case, in which the minerals had been leased at certain rents and royalties, with a provision that they should not be taken from underneath certain specified places, the Vice-Chancellor (Wood) was of opinion that in a lease of that description there was a presumption that the right to support was reserved, unless it appeared distinctly, by express words upon the instrument, that it was intended to be given up. Upon that case it may be observed, as distinguishing it from the present, that the demise there was of all the minerals of every description under the land, and not of one seam of coal called the High Hazle Bed, as in the present case; and further, that it does not appear what the reservation of rent was, whether of an acreage rent or in any other form. We may assume, however, that there was not a minimum rent as for two acres got, or so important a feature would not be omitted from the report of the case, and of the judgment. The Vice-Chancellor in the judgment refers to the case of the under story of a house being conveyed as analogous, which, as we have before stated, seems to us a different case.

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(1) 5 M. & W. 60.

(2) 12 Q. B. 739.

(3) 5 E. & B. 30; 20 L. J. (Q.B.) 10; 24 L. J. (Q.B.) 260. 1 Jur NS 825

(4) 8 H. L. C. 348; 30 L. J. (Q.B.) 49. 6 Jur NS. 965.

(5) 8 H. L. C. at p. 360. 6 Jur NS 96

(6) 3 K. &. J. 695. 3 Jur NS. 668

But this decision appears to us to be qualified by the subsequent cases of *Shafto* v. *Johnson*, decided by the same learned Judge (of which there is a full report in 8 Best & Smith, p. 252), and *Taylor* v. *Shafto*. (1) Both these cases involved the same question, namely, whether lessees of coal mines under a certain lease, who had so worked the mines as to let down the surface, had committed an actionable wrong, in which case the mining lease would not have been an incumbrance to the title to the surface afterwards conveyed, or had only done acts which the lease authorized them to do, in which case the lease would have been an incumbrance.

In *Shafto* v. *Johnson* (2) Vice-Chancellor Wood came to a different conclusion from that which he had arrived at in *Dugdale* v. *Robertson* (3), and though there were no words distinctly reserving the right to support, he held in effect that the lessees were not responsible for the subsidence caused by getting the minerals. He commences his judgment (2) as follows:—"I have carefully considered the lease, and I cannot arrive at the conclusion that any

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(1) 8 B. & S. 228.

(2) 8 B. & S. at p. 252, n.

(3) 3 K. & J. 695. 3 Jur NS 687

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act has been done by the lessees which is unlawful and contrary to the stipulations contained in it."

This embodies the view which we take of such a case as the present. In the subsequent part of the same judgment, in which the subject is gone into very fully, and the whole of which is well worthy of consideration, the learned judge refers to the case of *Dugdale* v. *Robertson* (1) as one which went to the full extent of the authorities, and in which the case was put as strongly as it well could be against the view which he was entertaining in the case under consideration. No doubt the case of *Dugdale* v. *Robertson* (1) is not disapproved of; but it does appear to us that the principle of the two decisions is not the same, and that the correct view is that taken at the beginning of the judgment in *Shafto* v. *Johnson* (2) which we have given above.

The judgment in the Exchequer Chamber in *Taylor* v. *Shafto* (3), agrees with that of the Vice-Chancellor in making the terms of the lease decisive as to the extent to which the lessees were justified in going in working the mines.

The case is not referred to as decisive of the present case, because the terms of the lease were different, and there were other covenants; but as shewing the proper principle of decision.

We must now refer to the terms of the lease in the present case, which seem to us to be sufficiently clear and precise. It first contains a demise of all the seam of coal called the High Hazle Bed, lying under certain closes, containing 108*a*. 3*r*. 1*p*. It then contains certain powers over the surface, for the exercise of which compensation is to be paid. It then gives power and authority to dig pits, &c., and "to win, get, work, raise up, stack, carry away, sell, and dispose of all that the said mine or bed of coal." It then gives authority to take clay, brick-earth, &c., from the surface, and to make bricks for necessary buildings. It will be seen presently that the authority to take all the mine, is afterwards qualified by certain express exceptions. We have then the clauses for payment of rent, according to which there is a minimum rent of 200*l*. a year, as for 2*a*. 1*r*. 16*p*. got, and in addition 85*l*. for every additional statute acre, including all ribs and pillars left in working the coal, with the exception of certain specified pillars. The meaning of this appears clearly to be, that as the coal cannot be worked without leaving certain ribs and pillars as the work is proceeding, those ribs and pillars, though not removed, are to be included in the half-yearly measurement from time to time of the acreage to be paid for. The pillars referred to are pillars left in working the mine, which have not reference to the support of the surface, but to prevent the mine from being blocked up by what would fall from the top of the mine and interfere with the working.

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(1) 3 K. & J. 695. 3 Jur NS 687

(2) 8 B. & S. at p. 252, n.

(3) 8 B. & S. 228.

Then follows afterwards an important clause of exceptions out of the mine which the lessees are to be allowed to take, and which exceptions are not to be measured in and paid for, viz., that the following pillars shall be left during the whole of the term; and they are then specified. This appears to us conclusive to shew that the other pillars, which are necessary for working the mine and measured in as the work proceeds, need not be left during the whole of the term, but may be removed when not wanted for working the mine in the usual manner.

Then follows afterwards another important clause regulating the manner of working the mine, by which the lessees covenant (inter alia) during the continuance of the demise to work and manage the mine to the best of their skill and discretion, and in a good and workmanlike manner.

It appears to us that, upon the reasonable and proper construction of this lease, it authorizes the removal of all the coal, with the exception of that which is covenanted to be left during the whole term, and subject to the mine being worked and managed during the whole term in a good and workmanlike manner.

If there existed any usual and approved mode of working mines in the district, we should further think the lessees were bound by it, though not expressly mentioned.

We have only then to consider the facts of the present case to see whether the defendants have made themselves responsible for what they have done, and upon this we think that the statements of the case are sufficient to absolve the defendants from liability.

It appears from the case that, in consequence of the defendants' workings, the land and buildings of the plaintiffs subsided: that the land would have subsided without the buildings, that all the pillars provided for by the lease had been left, and that there was nothing in the course adopted by the defendants in their coal workings contrary to the usual course of mining in the district. It would have been better if, instead of this negative statement, there had been a positive statement that the mine was worked in a good and workmanlike manner, and according to the usage of the district; but we think the actual statement necessarily amounts to this.

The statement, that enough pillars might have been left to support the surface is of an obvious truism, and ought to have no effect.

We think, therefore, that the defendants have only done what they were authorized to do by this lease, and that for the reasons above given they are entitled to our judgment.

This makes it unnecessary to consider the other questions argued before us, viz., to what extent the plaintiffs are entitled to recover.

BRAMWELL, B. In this case the defendants have a lease of a seam of coal. It may not appear of much consequence by what name their interest is called, but the word "lease" may in such cases have helped to a particular conclusion. For by that word we commonly understand a temporary estate granted in something which, at the end of the term, is to be restored to the lessor in the condition in which it was delivered to the lessee, fair wear and tear excepted, as in a lease of land, house, or moveable chattel. But that is not the intention of a lease of a seam of coal. That is more a sale of the coal, or grant of a right to take and remove it within a certain time, and it is not to be restored at the end of that time to the grantor. Treat it as a sale of the coal, provided the vendee get it all within a certain time, and why should the grantor be at liberty to say "Though in terms I sold the whole of it, yet by implication I reserved as much as was necessary to support the surface in its natural condition." Why should not the argument be good, "If you meant that exception you should have said so in words." Suppose a sale of brick earth or gravel, by metes and bounds, and suppose the vendee took it all, and suppose then the soil of the vendor outside the boundary crumbled in for want of lateral support, would the vendee be liable to a claim in respect thereof by his vendor, and, if he would, why? With great respect, such a

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dealing with a seam of coal is more like selling the materials of an intermediate floor than letting or selling the floor. Suppose a man with a three-storied house sold the materials of the second floor, would he have a right to say, "But you must leave enough to support my third story, or you must prop it up?" It is true a lessee of a mine may take all the coal, and artificially prop the surface; but, practically, this is impossible owing to the expense; and the same argument applies, viz., why did not the grantor stipulate for it? It may be said that if this argument is true of a lease or grant of coals, to be taken in a certain time, it would be equally so of a grant to be taken whenever the grantee thought fit; if so, of all cases where the ownership of mines and surface was severed; and that the authorities are overwhelming the other way. But, in the first place, the argument is not so strongly applicable where the grant allows the grantees to take at any time, because a grantor may well allow his land to be let down, provided it is to be done within a certain time, where he would object if he could not tell for all futurity when it might happen. In the next place, where the terms of the severance are not known, but only that there is a severance, then it may as well be presumed one way as the other. That is a case of ownership, not contract as this is. Here the terms of the contract that gives the right to take the coal are known, and the question is, why does not the general principle apply, viz., look at what is said in the deed, and add nothing, except from a necessity for doing so. Then those terms give the defendants the whole of the coal, for there is no difference between the words "the coal" and "all the coal," and indeed the words here are "all that seam." Then what necessity is there for implying a matter contradictory thereto, viz., that the right is not to the whole of the coal, but only to part, leaving enough to support the surface?

But supposing these would be right principles on which to decide this case, and I am not sure they would, I have great difficulty in applying them to this case, and in adopting the forcible arguments of my Brothers Martin and Cleasby. For the cases have established that where there is a severance of mines from the rest of the soil, however it may have been created, what the learned counsel for the plaintiffs called the natural right is, that those

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entitled to the mines, and those entitled to the residue of the soil, must each so use his part as not to injure the other; probably on the basis of the maxim, sic utere tuo ut alienum non lædas. This rule was alleged by the plaintiffs, and indeed admitted by the defendants' counsel, to apply to cases where the mines were leased. And it was agreed that the question must depend on the terms of the lease, and whether from them this natural or ordinary right had been given up by the lessor. For these positions *Harris* v. *Ryding* (1), *Humphries* v. *Brogden* (2), *Smart* v. *Morton* (3), *Rowbotham* v. *Wilson* (4), *Dugdale* v. *Robertson* (5), *Taylor* v. *Shafto* (6), and other cases were cited. It seems to me that *Dugdale* v. *Robertson* (5) is not easily distinguishable from this case.

Assuming this rule to apply to leases, we must examine the deed to see if there is anything to take away this so-called natural right. Now the lessees are to pay by an acreage rate no doubt, and so if they have to leave pillars they will pay for what they do not take. It may be they have allowed for this in calculating the rent. It is expressly provided that the measurement is to include "all ribs and pillars left in working the said coal," except certain named pillars. They will therefore have to pay for something included in the acreage which they must or may have to leave for any reason, and why not then for pillars to support the surface? Further, it was said that the obligation which is laid on the lessees to leave certain named pillars precluded the necessity of leaving others, on the principle of expressio unius est exclusio alterius. But this is not so. That maxim only applies where the expressed matter would be superfluous if the implied were expressed or assumed. That is not the case here. The named pillars are to be left for wholly different purposes than the general support of the surface. This was decided in *Dugdale* v. *Robertson* (5) (see per Wood, V.C., in *Shafto* v. *Johnson*. (7)) In the result I find nothing to limit that natural or ordinary right, if it exists in cases of leases of mines, and so far I should have great difficulty in deciding against

(1) 5 M. & W. 60.

(2) 12 Q. B. 739; 20 L. J. (Q.B.) 10.

(3) 5 E. & B. 30; 24 L. J. (Q.B.) 260. 1 Jur NS 825

(4) 8 H. L. C. 348; 30 L. J. (Q.B.) 49. 6 Jur NS. 985

(5) 3 K. & J. 695. 3 Jur NS 687

(6) 8 B. & S. 228.

(7) 8 B. & S. at p. 257, n.

the plaintiffs. *Taylor* v. *Shafto* (1) and *Shafto* v. *Johnson* (2) are in no way contrary to *Dugdale* v. *Robertson*. (3) In those cases it was held, both at law and in equity, that the lessor of the mines had made the lessee covenant to do what was inconsistent with leaving supports for the surface. The Vice-Chancellor says (4), "I can come to only one conclusion, viz., that there was an intention that all the coal that could be got, regard being had to the safety of the mine, should be got."

The second question is this: the defendants' lessor, Sotheron, conveyed the whole of the premises, including the reversion in the mines, to Roberts; Roberts reserving to himself the rent and reversion of the mines, fire-clay, other clay, stone, and minerals, granted and conveyed the residue of the soil to the plaintiffs. And it was contended by the defendants, that by this conveyance the grantees took without a right to support for houses built over the mines, and without a right to recover damages for injury to houses arising from the surface being let down by mining operations. This undoubtedly is so, if those mining operations were carried on by Roberts, or by his lessees, under leases granted subsequently to the conveyance to the plaintiffs. But it was said by the plaintiffs not to apply to the defendants, who were lessees at the time of the conveyance to the plaintiffs. I think it does. The lease of June, 1840, under which the defendants have the right to work, is mentioned in the conveyance to the plaintiffs, and the words are general and unqualified: "Roberts, his heirs or assigns, tenants or lessees, shall not be responsible for damages caused to dwellings which shall hereafter be erected," by mining operations. And it is clear that as the mines and the reversion to the mines were separated from the rest of the soil, Roberts covenants with the plaintiffs for the performance of the same matters for the benefit of the surface owners that the lessees had covenanted with Sotheron to perform for their benefit. And it is also clear that a power of distress which is given to the plaintiffs, would enable them to distrain on the defendants' goods. It is asked, why are the defendants to have the benefit of an arrangement to which they are not party or privy? The answer is, that the very foundation of the plaintiffs' case is a right to support as against the defendants, and if the plaintiffs have taken their estate without that right the defendants incidentally get a benefit perhaps not contemplated. It may be that Roberts thought the defendants entitled to work so as to cause subsidence of the surface. It may be, though we cannot see why, that he wished them to be so entitled. Be that as it may, it seems clear to me that the plaintiffs have taken their estate subject to a right in Roberts and his tenants, including the defendants, to damage the surface houses without a liability to compensate the plaintiffs and their tenants. It is as though a man owned farms A and B, and granted B, reserving a right of way over it to himself as owner, and his tenants, of A. This would operate as a grant by the grantee of B, and would enure for the benefit of an existing lessee of A. It would be strange if the defendants could surrender their lease, and then on the grant of a new one have the right, and yet not have it now. But there is nothing in the conveyance to the plaintiffs to take away their natural or ordinary right of support to the land, if it exists, and therefore if there is any damage to land by subsidence, and the defendants are not right on the first question, the plaintiffs are entitled in respect of it. This is probably of small consequence, and having regard to the opinion of Martin and Cleasby, BB., I answer both questions in favour of the defendants.

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(1) 8 B. & S. 228.

(2) 8 B. & S. at p. 252, n.

(3) 3 K. & J. 695. 3 Jur N.S. 687

(4) 8 B. & S. at p. 255, n.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Pattison, Wigg, & Co.*
Attorneys for defendants: *Singleton & Tattershall.*

[IN THE EXCHEQUER CHAMBER.]

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June 25.

ANTHONY *v.* THE BRECON MARKETS COMPANY.

Corporation filling two Capacities—Licence to erect and use—Slaughter-house—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *ss.* 126–129.

By a local Act passed in 1862, the corporation of Brecon were empowered to carry out certain public works, including a cattle market and slaughter-house. The corporation not having erected either a cattle market or a slaughter-house, and having become largely indebted, a second local Act (incorporating the Markets and Fairs Clauses Act, 1847) was passed, by which their creditors were incorporated as the Brecon Markets Company, with powers, by s. 64, to erect a cattle market, and, by s. 65, "with, but not without, the consent of the corporation testified by writing under the hand of the mayor or town clerk, to provide and maintain slaughter-houses . . . . upon such sites as they may think expedient."

The corporation was at that time, by virtue of the Public Health Act, 1848, s. 12 (adopted in 1850), and the Local Government Act, 1858, ss. 5 and 24, the local board; and by s. 45 of the latter Act the provisions of the Towns Improvement Clauses Act, 1847, with respect to slaughter-houses, were incorporated, the local board being, by s. 7, substituted for the commissioners. By the Towns Improvement Clauses Act, 1847, s. 126, no place (not already so used) is to be used as a slaughter-house, unless "a licence for the erection thereof, or for the use and occupation thereof as a slaughter-house," has been obtained from the commissioners. By s. 128, the commissioners are to make bye-laws for the regulation of slaughter-houses, and by s. 129, on the conviction of any person for the violation of these bye-laws, the convicting justices may revoke the licence granted under that or the special Act, and the commissioners may refuse to grant a fresh licence to such person.

The Brecon Markets Company applied for and obtained from the corporation, under s. 65 of the second local Act, their consent in writing to erect a slaughter-house; and having erected it, they let the tolls to the plaintiff. The plaintiff being prevented by the inspector of nuisances from slaughtering at the slaughter-house, on the ground that no licence for its erection and use had been granted by the local board under the Towns Improvement Clauses Act, 1847, s. 126, the plaintiff brought an action against the Brecon Markets Company for want of title to let the tolls:—

Held (reversing the decision of the Court below), first, that the consent given under s. 65 of the local Act was not merely given by the corporation in respect of their proprietary interests, but was given by them as the local board; secondly, that the licence to erect included a licence to use when erected.

Quære, whether the defendants were subject to the control of the local board under ss. 128, 129 of the Towns Improvement Clauses Act, 1847?

Appeal from the decision of the Court of Exchequer, making absolute a rule to enter the verdict for the plaintiff. (1)

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(1) Law Rep. 2 Ex. 167.

The action was brought to recover damages for breach by the defendants of their warranty of title contained in a demise to the plaintiff of the tolls of a slaughter-house. The defendants had erected the slaughter-house under the powers of the Brecon Markets Act, 1862 (25 & 26 Vict. c. clxxxvi.), which by s. 65 empowered them "with, but not without, the consent of the corporation (of Brecon), certified by writing under the hand of the mayor or town clerk, to provide and maintain slaughter-houses, proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, upon such sites as they think expedient," and by s. 76 to take tolls at the slaughter-house, and by s. 82, to let them. The defendants having obtained the consent of the corporation under s. 65, erected the slaughter-house in question, and afterwards let the tolls to the plaintiff.

The plaintiff was afterwards prevented by the inspector of nuisances, acting under the orders of the corporation as local board, from slaughtering at the slaughter-house, on the ground that no licence had been granted to the slaughter-house by the local board under the Towns Improvement Clauses Act, 1847, s. 126.

By s. 12 of the Public Health Act, 1848 (11 & 12 Vict. c. 63, which was adopted in Brecon in 1850), and the Local Government Act, 1858 (21 & 22 Vict. c. 98), ss. 5 and 24, the corporation of Brecon was the local board; and by s. 45 of the latter Act the provisions of the Towns Improvement Clauses Act, 1847, were incorporated, the local board being, by s. 7, substituted for the commissioners. By s. 125 of the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), the commissioners may license slaughter-houses and knacker's yards within the limits of the special Act; and by s. 126 "no place shall be used or occupied as a slaughter-house or a knacker's yard within the said limits which was not in such use and occupation at the time of the passing of the special Act, and has so continued ever since, unless and until a licence for the erection thereof, or for the use and occupation thereof as a slaughter-house or knacker's yard have been obtained from the commissioners."

The defendants contended that the consent given by the corporation under s. 65 of the local Act either was the licence required by s. 126 of the Towns Improvement Clauses Act, or was by the provisions of the local Act in substitution for it.

At the trial a verdict was entered for the defendants, with leave to the plaintiff to move to enter a verdict for him for the amount of damages assessed by the jury, on the ground that the defendants had no right to use or permit to be used the slaughter-house let to the plaintiff without the licence of the local board. A rule was obtained accordingly, and was made absolute in Hilary Term, 1867. The defendants appealed. (1)

June 25. *Dowdeswell, Q.C.* (*G. B. Hughes* with him), for the defendants, contended, first, that the provisions of the Brecon Markets Act, 1862, were intended to be in substitution for those contained in the Towns Improvement Clauses Act, and excluded their operation, citing *Conservators of the Thames* v. *Hall* (2), per Montague Smith, J.; *Rex* v. *Cator* (3); *Rex* v. *Davis* (4); *Reg.* v. *Champneys* (5); *Thorpe* v. *Adams* (6); *Michell* v. *Brown* (7); secondly, that the consent given under s. 65 of the local Act was also a licence under s. 126 of the general Act, citing *Pedder* v. *Mayor of Preston* (8), and *Nowell* v. *Mayor of Worcester* (9); and thirdly, that by the provisions of the local Act (ss. 76, 81, 82) they had an absolute title to let even though a further licence for the use of the slaughter-house was requisite.

Giffard, Q.C. (*R. Rees* with him), for the plaintiff, contended that upon the form of the leave reserved the last question did not arise; that neither the local Act, nor the Markets and Fairs Clauses Act, 1847, which was incorporated, contained any sanitary provisions; that the local Act was a mere Act to settle the private proprietary interests of the corporation and their creditors; that the consent authorized by s. 65 could not therefore have any reference

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(1) The particulars of the case, and the material sections of the various Acts of Parliament are set out in the report below (Law Rep. 2 Ex. 167), and are fully noticed in the judgment of Willes, J., post, p. 402.

(2) Law Rep. 3 C. P. 415, at p. 421.

(3) 4 Burr. 2026.

(4) 1 Leach, 306.

(5) Law Rep. 6 C. P. 384.

(6) Law Rep. 6 C. P. 125.

(7) 1 E. & E. 267; 28 L. J. (M.C.) 53. 5 Jur. N.S. 707

(8) 12 C. B. (N.S.) 535; 31 L. J. (C.P.) 291. 9 Jur. N.S. 496

(9) 9 Ex. 457; 23 L. J. (Ex.) 139. 18 Jur. 84

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to the powers and duties of the corporation as a local board; and that it was still necessary to have a licence from them in that capacity under s. 126 of the Towns Improvement Clauses Act, 1847, which, having regard to the character of the local Act, and to the subsequent sections relating to the control of the slaughter-houses, could not be taken to be excluded by it.

Dowdeswell, Q.C., in reply.

Cur. adv. vult.

June 26. The following judgments were delivered:—

Ante 401

WILLES, J. In this case, which was argued before us yesterday, the plaintiff brought an action against the Brecon Markets Company, stating that they had demised to him the tolls of a new slaughter-house, and the declaration averred, as a breach of contract, that the defendants had not at any time during the term any right or title so to let them, and that by reason of their want of title the plaintiff never had or could have at any time during the term the receipt and enjoyment of the tolls.

It appeared at the trial that the defendants had erected a slaughter-house under a licence or consent from the corporation of Brecon, as to which it is stated in the case on appeal that "the document itself being lost, secondary evidence of the contents was given at the trial, from which it appeared that such consent was in the form of a resolution of the town council signed by the town clerk, giving permission to the defendants to provide and maintain slaughter-houses under the 65th section of the Brecon Markets Act, 1862. The consent did not specify any particular slaughter-houses, and at the time when the consent was given the site had not been determined upon." The contention on the part of the plaintiff was that this was an insufficient licence to erect a slaughter-house, and he insisted that there ought to have been a licence pursuant to the 125th and following sections of the Towns Improvement Clauses Act, 1847, and he complained that, the licence being insufficient for that reason, the inspector had interfered with the slaughtering and so prevented him from earning the tolls which would have been payable. This interference of the inspector of course goes for nothing unless a licence was necessary under that Act, and the question raised for our examination is, whether the consent given by the corporation under their local Act stood in place of and included a licence under the Towns Improvement Clauses Act, 1847. The Court of Exchequer were of opinion that it did not, and they founded their opinion on this, that the application was made under s. 65 of the Brecon Markets Act, 1862, and was granted by the corporation intending to act under that section, and that, intending to act under that power only, they could not be taken to have acted on s. 126 of the Towns Improvement Clauses Act, 1847; that the instrument was to be taken to be the exercise of their power under the local Act, and not under the public Act; and the special ground of the judgment was stated by the Chief Baron to be that there was no intention in the licence to protect the public health, but that it was only intended with reference to the claims of the Brecon Markets Company and the corporation on one another, and there still remained the power to be exercised under the public Act.

It is necessary to consider these Acts in point of time; and, first, to deal with the local Act and its effect, and then to see the operation upon it of the public Acts. The corporation of Brecon, which was one of the most ancient in the kingdom, had the right to various market-tolls. They thought it desirable that power should be given for providing (amongst other things) a slaughter-house for the borough, and the Act of 1 & 2 Vict. c. xii. was passed for that purpose, and also to give them power to provide a market-house in the borough for the exercise of their old market rights. They had under this Act provided a market-house but not a cattle market or a slaughter-house. They had become indebted to a great number of persons. It was suggested that the tolls were not properly collected, and it was supposed that it would be for the interest of their creditors to constitute a new company or corporation to collect them. Accordingly, by 25 & 26 Vict. c. clxxxvi., the Brecon Markets Company was formed, consisting of the creditors of the corporation, and by the recital it was stated that it was expedient that parts of the property of the corporation should be vested in and managed by the company, and that such provision as was by the Act made should be made for the discharge of the debts and liabilities of the corporation; and, further, that it was expedient that 1 & 2 Vict. c. xii. should be repealed, and that other provisions with respect to the markets and fairs of the borough should be made; and that the company should be authorized to provide a new market-place in the borough for the cattle market and slaughter-houses, and to acquire land for the purpose, and to remove thither the cattle market. Then, by s. 4, certain Acts are incorporated, including the Markets and Fairs Clauses Act, 1847, but not the Towns Improvement Clauses Act, 1847; provisions are made (s. 63) for the management by the company of the markets and fairs, for payments to be made by the company to the corporation (ss. 42, 43), and for the application of the tolls in paying off the debts of the corporation (s. 47). Then by s. 64 "the company may make, provide, and maintain on any land vested in or acquired by them, a proper and sufficient place for holding the cattle market, with such convenient works and conveniences as they think fit." That gives the company an absolute right to make the market, without any control of the corporation over them. Then s. 65 is differently framed; it enacts that "the company from time to time, if and when they think fit, and with, but not without, the consent of the corporation testified by writing under the hand of the mayor or town clerk, may provide and maintain slaughter-houses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighbourhood, upon such sites as they think expedient; but if any slaughter-houses be provided, they shall be provided as near as conveniently may be to the cattle market place provided under this Act, and the slaughter-houses so provided shall be deemed part of the market-place." The only other sections to which it is proper to refer are s. 76, which gives power to the company to take tolls for slaughtering in any slaughter-house of the company; s. 85, which authorizes the inspector of provisions, or other officer appointed by the company, to enter into and inspect any building which he believes to be used for slaughtering, so as to preserve the company's monopoly; and s. 86, by which the company is to have control over the offal and refuse of the slaughter-house.

Under that Act it was that an application was made to the corporation, and its consent, already mentioned, given by the town council in accordance with s. 65; and in pursuance of that consent the slaughter-house was erected. Everything, so far as appears, was done regularly, and it is only in consequence of the operation of the public Act that the objection was taken from which the present difficulty arises.

This analysis of the Act of 25 & 26 Vict. c. clxxxvi., clearly shews that the consent to be given by the corporation to the construction of a slaughter-house under s. 65 had something more in view than the private interest of the debtors. The payment of the debts was provided for by another section (s. 47). The power to erect a cattle-market was given absolutely; it is in respect of a slaughter-house that the consent is required. And for an obvious reason: because it might turn into a nuisance, and, the corporation having charge of the inhabitants of the borough for their welfare, they are entrusted by s. 65 with the power of consent to or dissent from its erection. It is difficult to follow the reasoning of the Court below, that the consent had nothing to do with sanitary purposes; there were no other purposes than the convenience of the inhabitants of the borough to be served by the corporation giving or withholding it.

I now turn to the public Acts with a view to ascertain the power given by them to the corporation to license the erection of a slaughter-house. We must begin with the year 1847, when two Acts were passed relating to slaughter-houses. One is the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14); in which s. 17 and the following sections down to s. 20 contain provisions for the erection of slaughter-houses. It is unnecessary to refer more particularly to those sections; they are incorporated in 25 & 26 Vict. c. clxxxvi. by s. 4.

By another Act of the same year, the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), ss. 125 to 131 inclusive, various powers are given as to slaughter-houses to the commissioners appointed under the statute. By s. 125, "the commissioners may license such slaughter-houses or knacker's yards as they may from time to time think proper, for slaughtering cattle, within the limits of the special Act," and by s. 126, "no place shall be used or occupied as a slaughter-house or knacker's yard within the said limits, which was not in such use and occupation at the time of the passing of the special Act, and has so continued ever since, unless and until a licence for the erection thereof or for the use and occupation thereof as a slaughter-house or knacker's yard have been obtained from the commissioners." What is this licence to future slaughter-houses to include? It has hardly been suggested that there was to be a licence for erection, and a subsequent licence for use when erected. Possibly in theory this might be maintained, but it would be a subtle refinement; and as it would tend to prevent people from spending money in erecting slaughter-houses which might be useless when completed, it ought not to be adopted. The true reading is that the licence to erect must primâ facie be a licence to erect a slaughter-house which shall be used as a slaughter-house, and that there are not to be two separate licences, one for erection and another for use. It is true that by two subsequent sections (ss. 128, 129), and especially by s. 129, abuse of the privilege may lead to suspension or prohibition, and it may be that a licence for use may then come into play separately; but when a licence is given for erection it is for a slaughter-house which is to be a slaughter-house in fact. That disposes of one difficulty in comparing s. 125 with s. 65.

That Act was followed by the Local Government Act, 1858 (21 & 22 Vict. c. 98), which is to be classed in the same category with Acts relating to the public health, and refers to them; by s. 7 of this Act the local board is substituted for the commissioners in carrying out and exercising the powers and provisions of 10 & 11 Vict. c. 34, and by s. 24 the local board is to be, in corporate towns, the mayor, aldermen, and burgesses acting by the council. The town council is, therefore, to be the proper board for this purpose, as it is for the exercise of the power contained in s. 65 of 25 & 26 Vict. c. clxxxvi. By a subsequent section (s. 45), the provisions of the Towns Improvement Clauses Act, 1847, with respect to certain matters are incorporated, and one of these matters is "(7.) with respect to slaughter-houses."

Therefore, looking at the history of licences to erect slaughter-houses, it is found that at the time when the Act of 25 & 26 Vict. c. clxxxvi. was passed, the proper persons to give the licence for the erection and use of slaughter-houses were the corporation acting by the council; and then on turning to s. 65 of that Act, on which the decision of the question must hinge, you have it under contemplation that the persons to give the licence under these respective Acts were the same. The body to consent was in each case the corporation acting by the council. In fact, the corporation acted by the council in giving their consent. Thus you have the same persons to give the consent, the same persons to receive it, and the thing consented to or licensed the same. The language of the sections is somewhat different, but the effect is the same.

Therefore the donors of the licence are the same; the effect of the licence is the same; the language of the Acts conferring the power is the same; the donees are the same; the object (as already observed) for which the corporation must have been intended to give their licence is the same (for no other can be conceived). It seems, therefore, to result necessarily, from a comparison of the two sections, that the consent given under s. 65 did include a licence under s. 126.

In giving our judgment it is necessary to regard the way in which the question was reserved, which was in substance, whether there should not have been a distinct licence from the corporation or the local board. It would probably be inconvenient to go into the third question raised by the ingenuity of Mr. Dowdeswell; it is also unnecessary, because looking at the question reserved, it does appear that the consent given under s. 65 was a licence under s. 126.

Whether the provisions of s. 129 of the Towns Improvement Clauses Act are to apply; whether the Brecon Markets Company are to be entrusted with the privilege of governing their own slaughter-house, or whether they are to fall under the power of the corporation, their debtors, it is unnecessary to say. One would desire they should have that power; but considering that the corporation are the persons entrusted with, and recognized by the Act of Parliament as persons interested in the welfare of the borough, we will not, as it is unnecessary, decide the point. All that it is necessary to decide is, that a licence having been given by the corporation to erect the slaughter-house, it may now be used as such. The judgment of the Court of Exchequer must therefore be reversed.

BLACKBURN, J. I only wish to add a few words to express distinctly that we do not decide the point of very great and general importance arising under s. 129 of the Towns Improvement Clauses Act, 1847. The result of these complicated statutes is that, where that Act applies, no new slaughter-house can be erected without a licence to erect and use by the local board, and subject to the various provisions contained in that statute. The most important of these is s. 129, by which the justices may under certain circumstances of abuse revoke the licence granted under that Act or the special Act, and the commissioners may refuse to grant any fresh one to the person whose licence has been so revoked. Now where there is a borough in which that Act has not been adopted, and subsequently an Act is passed, incorporating the Markets and Fairs Clauses Act, 1847, and by it a trading body or any other person is permitted to have a market and to set up a slaughter-house, and so gets under the Markets and Fairs Clauses Act a power so to use it and a monopoly, the question arises, whether the body so authorized to erect and use is to any and what extent under the control of the local board exercising the powers of the commissioners. That is a question of very considerable importance, and I am anxious to say that we do not decide it. I quite agree that when the licence of the local board is required to erect a slaughter-house, it is a licence to erect, and when erected to use; and that it is the same under the special Act. And I also agree that the licence given by the corporation, who are the local board, is to all intents and purposes a licence given by the local board to erect and use. Therefore, I think the judgment should be as stated by my Brother Willes, that the judgment of the Court of Exchequer should be reversed.

KEATING, MELLOR, LUSH, and BRETT, JJ., concurred.

Judgment reversed.

Attorneys for plaintiff: *Heath & Parker, for Games, Brecon.*
Attorneys for defendants: *Dobinson & Geare, for Cobb, Brecon.*

THE SHEFFIELD WATERWORKS COMPANY *v.* BENNETT.

1872
July 26.

10 C.P. 447
45 D.
9 Q.B.D. 147
151-4-7-
11 Q.B.D. 190
260-1, 5

Water-rate—Rent—Annual Value—Landlord paying Rates.

By their local Act (16 Vict. c. xxii.), s. 79, the plaintiffs were bound to supply the houses within a certain district with water, "at the following rate per annum, that is to say, where the *rent* of such dwelling-house" should not amount to 7*l.* per annum, at a rate not exceeding 6 per cent. per annum on such *rent*, but not exceeding 7*s.* 2*d.* per annum; and so on in a graduated scale.

The defendant was owner of numerous small houses supplied with water by the plaintiffs, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate, and district rate:—

Held, that *rent* in s. 79 was equivalent to *annual value*, and that in estimating the rents on which the water rate was payable, the defendant was entitled to deduct the rates so paid by him.

Rook v. *Mayor, &c., of Liverpool* (7 C. B. (N.S.) 240), distinguished.

Affirmed in Ex. Ch. L.R. 8 Ex. 196

SPECIAL CASE stated in an action brought to recover the sum of 31*l.* alleged to be due to the plaintiffs for water-rates; the defendant having paid into court 24*l.* 10*s.*, a verdict was taken for the residue (subject to a case), at the York Spring Assizes, 1872.

The rates in question were due in respect of water supplied by the plaintiffs during the two quarters ending respectively on the 25th of March and the 24th of June, 1871, to ninety-six dwelling-houses, of which sixteen were situated in the township of Sheffield, and the remainder in the adjoining township of Brightside Bierlow.

The defendant was owner of these dwelling-houses, which were let by him at rents varying from 7*l.* 16*s.* to 26*l.* per annum, for terms not exceeding three months; and in estimating their rateable value he claimed to deduct certain sums paid by him for rates under the following circumstances.

By 32 & 33 Vict. c. 41, s. 1, "the occupier of any rateable hereditaments let to him for a time not exceeding three months," is entitled to deduct the poor-rate paid by him from the rent; but the tenants of several of the houses in question held on the terms that they should not take advantage of that section, and should pay their respective rents without deducting the sums paid by them for poor-rates. (1)

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(1) By s. 3 of the same Act the owner of any hereditaments of a rateable value not exceeding (in any place except London, Liverpool, Manchester, or

By the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 55, the general district rates are to be assessed on "the full net annual value" of the premises rated, ascertained by the last previous poor-rate; subject to the exception that the owner may, at the option of the local board, be rated instead of the occupier, in respect of premises under 10*l.* "rateable value," or premises let to monthly or weekly tenants, or in separate apartments, or at rents payable at shorter than quarterly periods, provided that "where the owner is rated instead of the occupier, he shall be assessed upon such reduced estimate as to the local board seems reasonable, of the net annual value, not being less than two-thirds, nor more than four-fifths such annual value."

Under this section the town council of the borough of Sheffield, being also the local board of the borough (which includes the township of Brightside Bierlow, but does not include several of the townships and places within the limits of the Company's Act) by a resolution dated the 20th of September, 1865, ordered that the general district rate should be levied on the owners instead of the occupiers of premises whose rateable value did not exceed 7*l.*, at the reduced estimate of three-fourths of their net annual value.

By the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68, "the water-rates, except as hereinafter and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water," and by s. 72, "the owners of all dwelling-houses or parts of dwelling-houses occupied as separate tenements, the annual value of which houses or tenements shall not exceed the sum of 10*l.*, shall be liable to the payment of the rates instead of the occupiers thereof."

The rents at which the defendant's houses were let were to be

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Birmingham) 8*l.*, may agree in writing with the overseers to be liable for the poor-rates on the premises, occupied or unoccupied; and by s. 4 the vestry may by order direct that the owners of rateable hereditaments, to which s. 3 extends, shall be rated instead of the occupiers. No agreement or order had been made under these sections affecting the premises in question.

taken to be the full rents obtainable for them on the terms upon which they were so let respectively.

The plaintiffs claimed to charge the water-rates in respect of all the houses, on the rents at which they were let, without making any deduction. According to this mode of computation, the rates due amounted to 31*l.*

The defendant contended that the water-rates should be charged on the annual value free of all tenants' rates and taxes; and that in ascertaining the annual value, a deduction should be made from the sums at which the houses were let, of the amounts allowed or paid by the defendant in respect of them for poor-rates, district rates, and water-rates, whether by virtue of statutory obligations or of voluntary agreements with the tenants. According to this mode of computation the rates due amounted to only 24*l.* 7*s.* 6*d.*

The material provisions of the plaintiffs' local Acts were as follows:—

By an Act passed in 1830 (11 Geo. 4. c. lv.), "The company of proprietors of the Sheffield Waterworks" were incorporated for the purpose of supplying with water the parish of Sheffield, including (amongst others) the township of Brightside Bierlow; and by s. 93 it was enacted that the company should furnish a sufficient supply of water, so far as their means would allow, to every inhabitant occupying a private dwelling-house, or part of one, in any place where their pipes should be laid, at certain rates specified, according to the rent, "and such rate shall be payable according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained, according to such rent as such inhabitant shall be assessed for the house tax." (1)

By the Sheffield Waterworks Act, 1853, (16 Vict. c. xxii.), s. 1, the Act of 1830, and a subsequent Act of 1845, extending the powers of the company, were repealed, "but subject to the provisions contained in this Act;" and by s. 6 the plaintiffs were to remain incorporated "as from the passing" of the Act of 1830, and according to the incorporation of the company thereby, with power to construct and maintain the waterworks, &c.; and by ss. 7, 8, they were to remain seised and possessed of the property and rights of or to which they were then seised, possessed, or entitled, and to maintain and use them for the supply of water within the limits prescribed by the Act.

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(1) See post, p. 414, n (1).

By s. 3, the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), was (amongst others) incorporated, except s. 54, which relates to cisterns, and "save so far as any of the clauses in any of the said Acts may be expressly varied or excepted by this Act;" and by s. 9, all clauses and provisions in favour of the company in any Act or Acts other than the recited Acts were to continue in force.

By s. 79 the company were required to furnish a "sufficient supply of water to every inhabitant occupying a private dwelling-house or part of a private dwelling-house," in any place within the limits of the Act where their pipes should be laid, for the use of his or her family, "at the following rate per annum, that is to say, where the rent of such dwelling-house or part of a dwelling-house shall not amount to 7*l.* per annum, at a rate not exceeding 6*l.* per centum per annum on such rent, but not in any such case to exceed the sum of 7*s.* 2*d.* per annum; where such rent shall amount to 7*l.* but not to 8*l.* per annum, at a rate not exceeding 8*s.* per annum;" and so forth, the maximum being for houses from 8*l.* to 10*l.*,—8*s.*; from 10*l.* to 12*l.*,—12*s.*; from 12*l.* to 15*l.*,—14*s.*; from 15*l.* to 18*l.*,—16*s.*; from 18*l.* to 20*l.*,—18*s.*; from 20*l.* to 25*l.*,—20*s.*; from 25*l.* to 30*l.*,—25*s.*; from 30*l.* to 35*l.*,—30*s.*; from 35*l.* to 40*l.*,—35*s.*; from 40*l.* to 50*l.*,—40*s.*; from 50*l.* to 60*l.*—45*s.*; from 60*l.* to 70*l.*,—50*s.*; from 70*l.* to 80*l.*—55*s.*; from 80*l.* to 100*l.*,—60*s.*; "and where such rent shall amount to 100*l.* or upwards per annum, at a rate not exceeding 3*l.* per centum per annum on such rent;" provided that the company should not be entitled to receive from any such inhabitant more than 6*l.* in any one year, nor should be obliged to furnish a supply for less than 7*s.* 2*d.*

Sect. 80: "In cases where the landlord or owner of a number of houses let at rents not exceeding 7*l.* a year respectively shall agree with the said company to pay the water-rent for the same, the company shall not in such cases charge more than 6*s.* 4*d.* a a year for each house for such supply, anything to the contrary in this Act contained notwithstanding."

By the Sheffield Waterworks Act, 1864 (27 & 28 Vict. c. cccxxiv.),

s. 105, the maximum water-rents were increased 25 per cent. for a period of twenty-five years.

By other Acts, passed in 1860 and 1867, the limits of the company's supply were extended to other parishes, townships, and liberties; but the provisions as to water-rents were only extended to the new district, and not otherwise altered.

It was further stated, as a fact in the case, that separate poor-rates were levied in each of the townships, parishes, and places included within the limits of the company's district; and that, in consequence of different modes of ascertaining the rateable value of premises prevailing in the different townships, &c., the sums at which similar premises were rated in some of the townships, &c., were relatively lower than in others; that during the two quarters for which the water-rates in question were claimed, there was levied in the township of Sheffield a poor-rate of 2*s.* 10*d.* in the pound, and in the township of Brightside Bierlow a poor-rate of 2*s.* 6*d.* in the pound, and that during the same period a district rate of 2*s.* in the pound was levied under the local government Acts in both townships.

The question for the opinion of the Court was whether, in calculating the water-rates, any deduction should be made from the sums at which the houses were let, in respect of payments made or allowed by the defendant for poor-rates, district-rates, or water-rates (A) in cases where such rates were so allowed or paid by virtue of statutory obligations in that behalf; (B) in cases where such rates were so allowed or paid by reason of the terms, voluntarily agreed to between the defendant and his tenants, on which the houses were let by him.

The Court was to be at liberty to draw inferences of fact.

June 21. *Field, Q.C.* (*Kemplay, Q.C.*, and *Barker* with him), for the plaintiffs, contended that "rent" meant, under ss. 79 and 80 of the Act of 1853, the same as it meant by virtue of the express words of the Act of 1830; that the application of s. 68 of the Water-works Clauses Act, 1847, was (if annual value there meant something different from rent) excluded by s. 3 of the Sheffield Water-works Act, 1853; but that, in fact, both terms signified the sum paid, as was shewn by sched. B to 48 Geo. 3, c. 55, and 5 & 6 Vict.

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c. 35, s. 60, sched. A (1); that *Rook* v. *Mayor, &c., of Liverpool* (2), was expressly in point in favour of the plaintiffs, and that the settlement cases confirmed the same view; *Rex* v. *St. Paul's, Deptford* (3); *Rex* v. *Framlingham* (4); *Rex* v. *Thurmaston South End* (5). [He also cited *Reg.* v. *Dodd* (6); and *Elston* v. *Rose.* (7)]

Manisty, Q.C. (*Cave* with him), for the defendant, contended that the proviso in s. 93 of the Act of 1830 was certainly repealed by the Act of 1853, and was probably repealed designedly; that if "rent" were read as meaning the sum actually paid, it would be impossible, in the absence of any such clause as occurred in s. 93 of the Act of 1830, and in 5 & 6 Vict. c. 35, s. 60, sched. A, to assess any water-rate at all where the owner himself occupied; that even in cases where a rent was paid, the effect of so reading it would be very inequitable, for that, on the one hand, in the case of a house let at a low rent to a friend or relative, the sum to which the plaintiffs would be entitled would be unreasonably reduced; and, on the other hand, they would, in such cases as the present, get the benefit of a rent enhanced by the very amount of the water-rates which the defendant has been compelled to pay under statutes which were certainly not passed for the purpose of increasing the revenues of the plaintiffs at the cost of the ratepayers; that the true meaning of "rent" was annual value, as in the Parochial Assessment Act, s. 1, and 25 & 26 Vict. c. 103, s. 15 (8); and that being so, it could make no difference whether

Rooke 411
Post 419

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(1) By 48 Geo. 3, c. 55, s. 1, and sched. B, a duty was imposed on inhabited houses as follows: "For every such inhabited house which, &c., shall be worth the rent hereinafter mentioned by the year," according to a certain scale. By 5 & 6 Vict. c. 35 (the Income Tax Act), s. 60, sched. A, No. 1, "the annual value of lands, hereditaments, or heritages charged under sched. A, shall be understood to be the rent by the year at which the same are let at rack rent, if the amount of such rent shall have been fixed by agreement commencing within the period of seven years preceding the 5th day of April next before the time of making the assessment; but if the same are not so let at rack rent, then at the rack rent at which the same are worth to let by the year."

(2) 7 C. B. (N.S.) 240.

(3) 13 East, 320.

(4) Burr. S. C. 748.

(5) 1 B. & Ad. 731.

(6) Law Rep. 1 Q. B. 16.

(7) Law Rep. 4 Q. B. 4.

(8) By the Parochial Assessment Act (6 & 7 Wm. 4, c. 96) s. 1, poor-rates are to be made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to

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the defendant paid the rates under a statutory obligation or by agreement; and, lastly, that *Rook* v. *Mayor, &c., of Liverpool* (1) was decided on the ground that the parties had, by their agreement, fixed the mode of assessment.

Kemplay, Q.C., in reply.

Cur. adv. vult.

June 26. The following judgments were delivered:—

Bramwell, B. This was an action by the plaintiffs for the recovery of a water-rate or rent from the defendant, who was the owner of many small houses in Sheffield; and the question was whether the plaintiffs were entitled to charge him according to what was called, and what in one sense is the "rent;" that is, the sum paid by the tenant to the landlord for the right to occupy the premises, without deduction; or whether the landlord, paying the water-rate, was entitled to deduct from the so-called rent of the premises the poor-rate, district-rate, and water-rate itself. The plaintiffs relied on the language of s. 79 of their private Act, which requires the company to supply water at rates fixed according to the "rent" of the premises supplied, and s. 80, which provides for the case of houses belonging to one landlord "let at rents not exceeding 7*l.* a year;" and they contended that the sum upon which the water-rate was to be calculated was what is commonly called the "rent;" that is, the sum paid by the occupier to the landlord for the right to occupy; that no mention was made of any abatement, and that therefore you had only to look to the actual sum paid. And it was said this was a very convenient way of ascertaining the amount to be paid, because if it came to discussion of what the true rent was, the question would be almost

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let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

By the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 15, the "gross estimated rental" is to be the rent at which the hereditament might reasonably be expected to let from year to year free of all usual tenants' rates and taxes and tithe commutation rent-charge, if any, provided that nothing herein contained" is to interfere with 6 & 7 Wm. 4, c. 96, s. 1.

(1) 7 C. B. (N.S.) 240.

impossible to settle. For instance, a landlord might say, "I do not receive as much for my premises as my neighbour does for similar premises, because mine are dilapidated, and a part of what I receive goes to keep them in repair." In answer to this argument it was said that (for reasons I will presently mention) you cannot in all cases take the rent as a criterion; but the plaintiffs replied that, although such cases existed, still the value of the premises to occupy was the rent without deductions, because, if the landlord had to pay them instead of the tenant, the premises were of so much the greater value to occupy; and that, with respect to this very water-rate, for example, it was as though the landlord had dug a well or laid on a conduit from a river, which had made the premises all the more valuable to the occupier. They further said that, if you cannot in all cases take the rent as a criterion, that should be done where it was possible.

On the other hand, the defendant insisted that it was impossible that the word "rent" could have the meaning contended for by the plaintiffs; and he called attention to the fact that the Act always speaks of the rent "per annum" of the premises, so that where there was no letting at a yearly rent, but from month to month or week to week, the case was on that construction not provided for. So again, no provision existed for the case of one who occupied his own house, or who occupied a furnished house, paying a lump sum for house and furniture; or again, where a man occupied a house which he had built, paying a ground rent. As to the difficulties which the defendant's construction would cause, his answer was that they would all have existed if the words "annual value" had been used instead of "rent," and yet no one would suppose they would have been insuperable. Therefore, what really has to be done, he insisted, is to ascertain the annual value or real rent of the premises; that is, the sum which the tenant pays for the right to occupy the premises in a normal state, with nothing but what may be called their freehold advantages, not with abnormal or adventitious advantages, such as having the water, poor, or district rate paid for him.

Next comes this observation on the defendant's part. At the time when the Water Company's Act passed they would at the outside only have a right to charge upon the then rents of the houses; and at that time the tenant paid all the tenants' rates. There does indeed appear to have been a possibility that the houses, or some of them, might have been made liable to a rate under Sturges Bourne's Act (1); but it has never been put in force in Sheffield; and, saving that exception, the tenant paid all tenants' rates. The obvious consequence of putting them on the landlord is to raise what is called the "rent," i.e., the sum paid by the tenant for his occupation. It is manifest that if a man gets a house of which he has not to pay the rates, he will pay more to the landlord than he would for a house of similar value of which he had to pay the rates; and therefore the defendant's argument was that, if the plaintiffs are right in their construction, the result of putting on the landlord the district, poor, and water rate is to increase the nominal rent paid to him, and consequently to increase the sum at which the occupier may be charged for the water-rate. Therefore these Acts, passed with a wholly different object, will have the effect of adding a percentage to the water-rates of the people of Sheffield. Certainly that is a strong observation; and further, it was pointed out that some ridiculous and impossible consequences would follow from the plaintiffs' construction. For instance, suppose a man to be the owner of two houses of precisely the same value. He occupies one; it is worth 9*l.* a year, and he is only liable to be rated at that sum. He lets the other, and has to pay the water, district, and poor rate upon it. He therefore lets it at upwards of 10*l.* a year, and the result will be that in respect of the house he occupies he will be liable to be charged at one rate for his water, and in respect of the neighbouring house that his tenant occupies he will be liable to be charged at another rate for the water supplied to his tenant. That cannot in reason be, unless there are some extremely plain words in the Act making it a positive necessity. Another consequence will follow. When the landlord has to pay the rates for his tenant, the effect may be to raise the rent above the amount to which the clause applies which makes the owner liable, and the consequence will be that he will not be under any obligation to pay the rates; whereas as soon as the tenant pays, the rent will go down below the statutory amount and the landlord will be liable. The consequence is that there will be certain houses which it will be impossible to say are, within the Acts of Parliament, such that the landlord must pay the rate, or that the tenant must pay the rate. That, again, is an absurdity.

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(1) 59 Geo. 3, c. 12, s. 19.

But the defendant, as I said before, contends that this really is no part of the rent; it is no part of the annual value of the premises. It cannot be likened to the case of a well dug on the premises or a conduit brought from a stream, which would become part of the freehold. This is not so; it is something used in conjunction with the freehold, and is no more part of it than gas would be, or warm air, which the landlord might supply from his neighbouring factory, and so save his tenants to a considerable extent the cost of coals, or steam power, which in manufacturing districts is often laid on. It would be unreasonable to say that these things contributed to the rent of the houses, although as between landlord and tenant they might conveniently use the term "rent," and agree that it should be distrained for, and in point of law it might all issue out of the realty. It is impossible to suppose that, for the purposes of the Act of Parliament, and to enable the company to charge rates upon the sum so payable, it would be rent.

That is the argument for the defendant, and I own it has prevailed with me. No doubt the word "rent" is used in the Act, but it is spoken of as "yearly rent"—a term which would exclude probably the most numerous class of cases, where there is no yearly rent, and other cases where there is no rent at all. For this reason, and because of the absurd consequences which would otherwise follow, it must mean "value."

I do not discuss the authorities, because I know my Brother Cleasby has done so. The only case on which I will make an observation is that of *Rook* v. *Mayor, &c., of Liverpool.* (1) There the parties seem, under the Act of Parliament, to have had a sort of right to come to an agreement; but in point of fact they had come to an agreement as to the sums upon which the rate was to be fixed, and the case was certainly to my mind decided on that ground.

(1) 7 C. B. (N.S.) 240.

CLEASBY, B. In this case the question for consideration is, what is the proper meaning to be given to the word "rent" in the 79th section of the Sheffield Waterworks Act, 1853.

According to that section houses are to pay water-rates upon a different scale according to the rents of the houses; not in exact proportion to the rents, but going by steps. For example, if the rent shall not amount to 7*l.* per annum, then at the rate for the whole year not exceeding 6*l.* per cent. on such rent; if the rent exceeds 7*l.* but not 8*l.*, then at a rate not exceeding 8*s.*, and so on upon a varying scale, and if the rent amounts to 100*l.* per annum the rate is not to exceed 3 per cent. upon such rent.

By the Waterworks Clauses Act (10 & 11 Vict. c. 17), s. 68, water-rates are to be payable according to the annual value of the premises, and this Act is only incorporated with the Sheffield Act where the provisions of the latter do not vary the former; and as the standard of rating is different, the 68th section is not so entirely applicable as to justify us in saying that the effect of the two Acts is that the annual value mentioned in the 68th section, and the rent mentioned in the 79th section of the special Act, must mean the same thing.

It should be noticed that in the earlier Sheffield Waterworks Act (11 Geo. 4, c. lv.), s. 93, the water-rates were payable according to the rent taken by certain steps in a similar manner, though not exactly the same, as in the present Act. But this Act is repealed, and is only adverted to on account of the general provision of s. 93, that the rate shall be payable according to the actual amount of the rent where it can be ascertained, and where it cannot be ascertained, then according to such rent as such inhabitant shall be assessed for the house tax.

Now when we refer to the Act for assessing the house tax (48 Geo. 3, c. 55), and to the schedule (B), we find the assessment is at certain rates where the houses "shall be worth" the rents after mentioned, and then follows the scale of rents and the assessment in the pound.(1) This, though not forming part of the Act in question, is well worthy of notice, as shewing the use of the word rent as signifying the rent which a house is worth, which is in

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(1) Ante, p. 414, n.

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other words the yearly worth or value. For although the actual rent is to be the guide when it can be ascertained, this must mean the actual rent when it represents the value, not where from other conditions under which it is paid as rent it is no criterion of value at all.

And the same reasoning, I think, applies to the Act in question. The word "rent" cannot signify strictly the rent actually or accidentally paid. In a row of houses all of equal value, one might be let at a nominal rent from love or affection; another might be let at a greatly reduced rent to a servant in the employ of the landlord; another might yield a small rent because the tenant had repaired the house himself or paid a premium; and no one would contend that in any such cases the actual rent would be the criterion. It would not be the criterion in any case in which it does not form a means of comparison with other houses as regards their worth. In general, the rent paid is what the house is worth, and is the real criterion of value as distinguished from a mere estimate. It makes the test a fact which is certain, and excludes partiality.

Having arrived at the conclusion that the actual rent is not necessarily the rent referred to in the 79th section, but the proper rent for the houses, which would in general correspond with the actual rent of small houses let at weekly rents, it follows that the proper rent must be ascertained by some regular and fixed standard, and not by a standard depending upon whether the house is let or occupied by the owner, or let for more or less than three months, or of less value than a particular sum, or upon the application of certain Acts of Parliament to the property, or upon the particular arrangement made between the landlord and tenants.

Now, upon the proper construction of the 79th section standing by itself, supposing no subsequent Act of Parliament on the subject of rating to be applied to the premises, the rent paid by an ordinary tenant, who himself paid all the rates and charges properly borne by occupiers, would clearly satisfy the word "rent."

It may appear that this would be so only as regards houses above the annual value of 10*l.*, because, as regards houses below that value, by the 72nd section of the general Act the owners of such houses are liable to the water-rate instead of the occupier, so as to make the water-rate necessarily as regards such houses part of the rent; but this is an apparent objection only. It would be an objection if the word "rent" in the clause in question must signify the rent which the tenant pays; whereas the more reasonable meaning is, what rent the premises are worth as rent under ordinary conditions.

The word "rent" may, I think, be read to mean what the landlord gets as rent under the usual conditions, though technically this is not its meaning; and if the landlord is obliged to pay the water-rate, all that he gets as rent, and all that ought to be taxed as rent, is the whole payment after deducting what he is obliged to pay.

The same reason applies with equal force to the payment for poor-rates and district-rates.

I thus hold the word "rent" in the 79th section to mean the proper rent to a tenant paying the rates and charges regularly paid by the tenant, of which the actual rent, when the tenant does pay those rates and charges, is in general the proper criterion; and this is the same thing as the yearly worth or annual value. And by so holding, we escape from the inconsistency of rating the premises upon a different standard according as the value of the premises makes the actual payment of the rates fall upon the tenant or the landlord.

The words "rent" and "annual value" are often used indiscriminately, and I think they are so in the 68th section of the general Act, and the 79th section of the special Act. As another instance (although it is not allowed to refer to the marginal reference in construing the clauses in an Act of Parliament, yet one may do so in considering the general sense in which words are used) the 72nd section of the Waterworks Clauses Act makes the rate payable by the landlord when the annual value of the premises does not exceed 10*l.*, and the marginal note is "owners of houses not exceeding 10*l.* rent to be liable to the rates."

With respect to the various authorities cited in the course of the argument, the settlement cases have not any real bearing upon a case like the present, where we are considering a system of rating houses. But it may be noticed that it would appear that the case of *Rex* v. *St. Paul's, Deptford* (1) was decided because the Court felt bound by a previous decision in *Rex* v. *Framlingham* (2); and as regards *Rex* v. *Thurmaston South End* (3), the words of the Acts of Parliament referred to were, as to one of them, that the house must be bonâ fide hired for 10*l.* by the year, and the rent paid for one year, and, as to the other, that the house must be rented at 10*l.* a year and the rent actually paid for that term. So that the payment by the tenant of the rent of 10*l.* for one year is the criterion of settlement, a reason which does not apply to the present case at all. The case of *Elston* v. *Rose* (4) raised a question as to the jurisdiction of the county court judge, and the grounds of decision do not at all assist the decision in the present case. In *Reg.* v. *Dodd* (5), a poor-rate case, it was held that the water-rate ought not to be deducted from the amount (11*l.* 5*s.*) found as a fact by the sessions to be the gross rental, on the ground that it did not come within any of the deductions allowable under the Parochial Assessment Act (6 & 7 Wm. 4, c. 96), s. 1. In that case there was nothing in the nature of a water-rate, but the water was supplied at the option of the inhabitants, and the agreed rent paid by landlord or tenant as arranged between them. The Court held it clear, and could not do otherwise, that the water-rate was not a tenant's rate or tax, and that it did not come within the other head of deduction, as an expense necessary to maintain the premises in a state to command the rent, any more than the supplying by agreement of meat or any other necessary of life would have done so. The case, therefore, has no bearing upon the question in the present case, which is, how the compulsory water-rate is to be imposed. In the present case all the deductions claimed are in respect of charges which are the subject of rates, and compulsory so far as the property is concerned.

But the case mainly relied on by the plaintiffs was that of *Rook* v. *Mayor, &c., of Liverpool.* (6) According to the marginal note, that case would be a strong authority in their favour, and if the question raised in that case and decided had not been complicated by an agreement between the parties, which was relied on in the judgments, and in fact formed the foundation of them, I should have felt bound by the decision upon a question of such a general nature as rating, and decided accordingly.

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(1) 13 East, 320.

(2) Burr. S. C. 748.

(3) 1 B. & Ad. 731.

(4) Law Rep. 4 Q. B. 4.

(5) Law Rep. 1 Q. B. 16.

(6) 7 C. B. (N.S.) 240.

In that case the water-rate was to be upon the annual value of the premises, and there was a power to compound where the yearly rent or value did not amount to 13*l.* There had been a composition paper, by which the appellant agreed to compound for the water-rates, and in a schedule the rental of the two sets of premises was stated to be 4*s.* 6*d.* per week and 3*s.* 6*d.* per week respectively; and there was a proviso that, in case the rentals were not correctly stated, the corporation might insert the correct rentals, and recover the water-rates accordingly. It appeared that in fact the rentals were sixpence a week more in respect of both rents of premises, the landlord claiming to deduct the sixpence for the rates paid by him. The Court held that in that case the appellant must be rated to the full amount, but not, it is submitted, because that would be the correct mode of rating independent of the terms of the composition, but because the appellant had agreed to make the actual rental the criterion, or rather the corporation had a right to act upon his having so agreed. Erle, C.J., in the course of the argument, says (at p. 257): "You say that the written contract between the parties is on the rental, and with a view to that alone, and that for aught that appears the council would not have entered into it upon any other footing." And the whole of his judgment afterwards given is to the same effect; the conclusion of it is, "My judgment is upon the terms of the composition paper which is before us." Mr. Justice Willes says: "It seems to have been agreed on both sides that the rent should be taken to represent the value." So that no judgment whatever is given upon the general question of annual value, but only upon the proper construction of the composition paper. There is no such question before us now, and therefore the decision does not in any way conflict with the reasons which we have given for the conclusion arrived at.

For the reasons above given I think that, in determining the class to which the houses belong, the actual rent paid by the tenant is not to be taken, but the sum which comes into the land-

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lord's pocket as rent after the deductions for water-rates, poor-rates, and district-rates, wherever he pays them. Our judgment must therefore be for the defendant.

Judgment for the defendant. (1)

Attorneys for plaintiffs: *Pitman & Lane, for Blakelock Smith, Sheffield.*

Attorneys for defendant: *Pattison, Wigg, & Co., for Broomhead & Co., Sheffield.*

June 26.

[IN THE EXCHEQUER CHAMBER.]

WHITECHURCH AND OTHERS (CHURCHWARDENS AND OVERSEERS OF ST. MARY, ROTHERHITHE) v. THE EAST LONDON RAILWAY COMPANY.

Rating—Liability of Company to make good Deficiency in Rates.

10 CP 81

By the East London Railway Act, 1865, the defendants were authorized to construct a system of railways numbered 1 to 7 (s. 22); and by s. 128 it was enacted that "if and while the company are possessed under this Act of any lands assessed, or liable to be assessed, to any sewers rate, consolidated rate, poor-rate, police rate, main drainage rate, church-rate, or other parochial or ward-rate, they shall from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates, by reason of those lands being taken or used for the purpose of the railway or works; and the deficiency shall be computed according to the rental at which those lands with any buildings theron are now rated."

No. 1 railway (which was the principal line) passed through R. parish, and through W. parish. The whole of that part of it which passed through R. parish was completed and actually worked; but the part in W. parish was unfinished, as were also several of the other railways:—

Held, by Willes, Keating, Lush, and Brett, JJ. (Blackburn and Mellor, JJ., dissenting), reversing the decision of the Court below, and approving the decision in *Reg.* v. *Metropolitan District Ry. Co.* (Law Rep. 6 Q. B. 698), that the defendants were liable to make good the deficiency in R. parish.

By Keating, Lush, and Brett, JJ., that the defendants were so liable until the whole of the railways authorized by their Act were completed.

By Willes, J., that the defendants were liable in respect of land taken for any one of the seven railways mentioned in s. 22, until that railway was completed.

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(1) The same question arose between the same parties, on a case stated by the stipendiary magistrate upon making an order on the defendant for payment of the water-rate according to plaintiffs' mode of calculation. In this case, therefore, judgment was given for the appellant: (*Bennett, app.* v. *Sheffield Waterworks Co. resp.*)

By Blackburn and Mellor, JJ., that as soon as any portion of the railway was completed, and liable to be assessed as a working railway, the defendants' liability under s. 128 in respect of the land occupied by it ceased.

Revd by H of L LR 7 HL 81.

ERROR on the judgment of the Court of Exchequer on a special case, stated in an action brought by the churchwardens and overseers of St. Mary, Rotherhithe, to recover from the defendants a sum of 310*l.*, the deficiency in the poor-rate, paving and general purposes rate, lighting rate, and sewers rate, upon lands taken by the defendants under their Act, and claimed to be due to the plaintiffs under s. 128 of that Act (28 & 29 Vict. c. li.)

The Court below gave judgment for the defendants. (Reported ante, p. 248, where the facts are fully stated.)

The plaintiffs brought error.

June 25. *Prentice, Q.C.* (*Morgan Howard* with him), argued for the plaintiffs.

Sir J. B. Karslake, Q.C. (*Poland* with him), for the defendants.

The arguments were the same as those used in the court below; and in addition to the sections there cited, the following sections were referred to.

By s. 3 of the Railways Clauses Act (8 Vict. c. 20), "the following words and expressions, both in this and the special Act, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction. . . . The expression 'the railway' shall mean the railway and works by the special Act authorized to be constructed." Post 427

By the East London Railway Act, 1865 (28 & 29 Vict. c. li.), s. 77, after reciting that deficiencies may arise in the assessments for the poor and other rates in the parish of St. Leonard's, Shoreditch, by reason of the construction of the railway and the taking down of houses, &c., it is enacted that "the said company shall, from and after the period when any land, house, buildings, hereditaments, or premises, shall be taken or become unoccupied or untenanted, by reason of the same being required for the purposes of the said railway by notice from the company, up to the period when the said railway shall be assessed to such rates as aforesaid, be assessed and rated for the same premises respectively, in such Post 428 435.

sum and sums of money as the same were assessed and rated previously to the passing of this Act, and the said company shall pay and make good to and in aid of such parish, out of the moneys of the said company, all such rates as aforesaid; and in default of payment thereof the same shall and may be levied and recovered from the said company, or their treasurer or clerk, in the same way or manner as the same could or might have been recovered from the owner or occupiers of the same premises in case this Act had not been passed." (1)

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435,

By s. 109, "while the company are possessed under the authority of this Act of any lands, houses, buildings, or other property assessed, or liable to be assessed, to any parochial or other general or special rate, and until any works to be constructed under the authority of this Act in the Whitechapel district are so far completed as to be assessed or liable to be assessed to an amount equal to or greater than the aggregate amount of the gross rateable value of the same lands, houses, buildings, and property for the twelve months immediately preceding the passing of this Act, the company shall be liable to make good the deficiency in the assessment for such rates by reason of such lands, houses, buildings, or property being taken or used by them for the purposes of this Act, and the deficiency shall be computed according to the rental at which such lands, houses, buildings, and property respectively were rated as aforesaid."

BRETT, J. On the best consideration that I can give to this case I think the judgment of the Court of Exchequer ought to be reversed. I hold the opinion that I ventured to express at an earlier period of the case, that the words "in the parish," must of necessity be read into some parts of the 128th section; for instance, after the words "assessment" and "deficiency," because the section is dealing with the liabilities within the parish. But the question seems to be, whether those words are to be read into the section after the word "railway" in the clause, "until the railway or the works thereof are completed and assessed, or liable to be assessed;" so as to limit the liability of the company to make good the

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(1) By s. 70 the same provision was made in favour of the parish of St. Matthew, Bethnal Green.

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deficiency in the parish to the case of the railway not being completed within the parish. I think the section is not to be so read. It is sometimes necessary to insert words in an Act of Parliament in order to avoid coming to a conclusion evidently contrary to the intention of the legislature; but unless the necessity can be shewn we ought not to do so.

Now there are reasons here why we should read in those words, and there are reasons why we should not. The reason why we should is, that inasmuch as the land taken is land in respect of which rates are paid within the parish, we ought to treat the railway, which is to be substituted for it as the rateable object, as the railway within the parish; that inasmuch as the obligation exists because lands have been taken, the rateable value of which has been destroyed, the liability of the company in respect of that destruction of rateable value ought to be done away with as soon as anything is given by the company in its place. The reason why we should not read in those words is, that whereas the assessable value of the land in its original state is destroyed by its being taken, the full value of the land with a railway upon it cannot be developed until the whole of the railway is completed, so as to be a workable line. There being then good reasons on both sides, and those reasons being very nearly balanced, they furnish no prevailing reason why we either should or should not read in the words "in the parish." We are therefore to read the words of the section in their ordinary sense.

There is, however, another consideration. This Act has incorporated with it the Railways Clauses Act, 1845 (8 Vict. c. 20), and phrases and terms occur in many other parts of the Act which are identical with those used in that Act. In all these cases, unless there is something in the special Act inconsistent with our doing so, the special Act ought to be read according to the general Act, that is, according to the interpretation clause in that Act, s. 3 (1). If so read, "railway" would mean the whole railway authorized to be made. Therefore, on that ground, I think the liability does not cease till the whole is completed.

Sir John Karslake has argued that it would follow that if any station whatever, or any portion whatever of the line authorized

(1) Ante, p. 425.

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were not constructed, the liability would continue for ever. But I think that is not the meaning, but that it means until the railway is substantially completed, so as to be a fit subject for rating as an entire railway.

LUSH, J. I have considered the arguments which have been addressed to us to the best of my ability, but I can see no reason to change the opinion I expressed in *Reg.* v. *Metropolitan District Ry. Co.* (1) We must consider what facts the legislature had in their minds in passing this Act. The clause in question is substantially in the same words as that in the Lands Clauses Act, 1845, s. 133, which applies generally to schemes of a public nature. It is well known that in making application to the legislature the promoters lay before them statements of traffic which are not founded on the anticipated traffic on some particular portion of the line, but on the whole line, and it is on these statements that parliament decides. Now the object of such clauses as the present is that the parishes through which the line runs shall not be losers by having their rateable property demolished, until the line is complete, so that they shall have the benefit of the improved value which the traffic on the whole line will give. When, therefore, in s. 128, the legislature enact that the company shall make good the deficiency on the lands taken until the railway or the works thereof are completed, they mean the contemplated scheme laid before them by the promoters asking for the bill; not that portion of the railway which may run through a particular parish, but the whole railway.

Other parts of the Act strengthen this view, and shew that this is the true construction. Several parishes have brought forward their own clauses and procured them to be inserted in the Act. Section 77 (2), enacted in favour of St. Leonard's, Shoreditch, provides only that the liability of the company to make good the deficiency shall continue until the railway is assessed in the parish. Then s. 128 (the general clause) provides for the continuance of the liability until "the railway or the works thereof are completed and assessed or liable to be assessed." A third clause is more favourable still; by s. 109 (3) it is provided in favour of Whitechapel that "until any works to be constructed under the authority of this Act in the Whitechapel district are so far completed as to be assessed or liable to be assessed to an amount equal to or greater than the aggregate amount of the gross rateable value of the same lands, houses, buildings, and property for the twelve months immediately preceding the passing of this Act, the company shall be liable to make good the deficiency in the assessment from such rates by reason of such lands, houses, buildings, or property being taken or used by them for the purposes of this Act."

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(1) Law Rep. 6 Q. B. 698.

(2) Ante, p. 425.

(3) Ante, p. 426.

Therefore, the Shoreditch section (s. 77) says, that until the company is assessed it is to make up the deficiency; the Whitechapel section (s. 109) says, it is to do so until the works (whether complete or not) are assessed at an amount equal to the original amount of the rateable property which they may occupy; the section in question (s. 128) stands between the two.

I agree that the clause is capable of the construction contended for by Sir John Karslake; but when we consider that it was put in in the interest of the parishes, we ought to adopt that meaning which is most for the benefit of the parish. I am of opinion therefore that the judgment below should be reversed.

MELLOR, J. I am of opinion that the judgment of the Exchequer should be affirmed. The defendants were authorized by their Act to construct a railway; they have actually constructed the part lying within Rotherhithe parish, and the part so constructed is now actually at work and in use as a railway under a lease to the London, Brighton, and South Coast Railway Company. I have always understood the rule to be that a railway in any particular parish was to be rated according to its earnings in that parish. If there is a subject capable of being used and let to the hypothetical tenant, it then becomes assessable to the rates according to its actual value.

That being the state of the facts and of the law, s. 128 certainly affords abundant ground for the decision of the Court below. So far as the interest of the parish is concerned, the parish obtains, I think, all that it was the intention of the legislature it should obtain. The legislature in effect say to the railway company, "You are going to take profitable property within the parish, to convert it, and to create something in its place. That will take time ; therefore, whilst the process of conversion is going on, you must make good the deficiency." But as soon as the railway is completed so as to be assessed in the parish, it becomes complete within the conditions of the section as to the time when the contribution is to cease.

I draw a different inference from the clauses cited by my Brother Lush from that which he has drawn. By one of these clauses (s. 109) a parish, which it seems was not satisfied with the general section, has obtained special advantages for itself; but if the decision of *Reg.* v. *Metropolitan District Ry. Co.* (1) is right in its interpretation of the meaning of the general section, I do not see what the object of the special section was; for if the effect of s. 128 is that which is given to it by that decision, the special section was unnecessary; the inference to be deduced appears to me therefore rather to detract from than to support the force of the argument in favour of that construction of the general section.

The 128th section is, as was said in the court below, very like, though somewhat differing from, s. 133 of the Lands Clauses Act, 1845, and may be properly construed by reference to that section. Therefore the cases suggested by my Brother Blackburn during the argument of railways constructed in portions may be fairly put by way of illustration. I cannot but think that the meaning was that when a railway is constructed in portions, and when any portion is so far completed as to be of an assessable value, the obligation to make good the deficiency is to cease. I admit that the clause is capable of the opposite construction, and that without doing any injustice to the railway company it might be provided that any deficiency, so far as it is occasioned by the railway company, should be made good by them. But, notwithstanding, I think the intention was that the obligation should only continue until the company should have given the parish an opportunity of assessing its works. That is, I think the true construction of the clause in question, viz., that when the railway is in fact made in a parish, that is, when it is so far completed as to be in a condition to command a rent and to be used as a railway, the obligation ceases.

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(1) Law Rep. 6 Q. B. 698.

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KEATING, J. In a matter where so much difference of opinion prevails, I must needs feel some hesitation; but I see no reason to change the opinion which I formed in the case of *Reg.* v. *Metropolitan District Ry. Co.* (1) Indeed, the question appears to me to be a not very obscure one. The object of the Act is stated clearly to be the connection of certain railways on one side of the Thames with railways upon the other side. This is the first and great object. Subsidiary connections between other railways are provided for, but the object of the Act is the connection of the railways on the north and south sides of the Thames. The company apply to parliament for powers to carry out this scheme. In order to accomplish their purpose, they must, in the first instance, inflict considerable injury on the parishes they pass through (which is the whole origin of the question), by taking lands and houses which afforded a contribution to the rates. Parliament therefore imposes on them the obligation of making up for what they deprive the parish of while they are constructing their line; and this is a highly reasonable condition. But the question is, in reference to what line is this said? I confess it appears to me that, looking at the probable object and intention of the legislature, it would be a just and reasonable provision to say, "you shall make up the deficiency you cause, until you have done what you have contracted with parliament to do, until you have substituted for what you have taken, not a mere fragmentary part of your line, but such a line as you have engaged to construct, and have put it into a condition in which there is a fair reason to suppose it capable of earning the profits which were expected by the promoters and by parliament." The question is, have they carried out this intention in words? I think they have, and that the contrary opinion cannot be maintained without doing more or less violence to the words used.

Sect. 128 fixes a period up to which the deficiency is to be made good, namely, until the railway is "completed and assessed or liable to be assessed." What does parliament mean by that? It is suggested (rather as the principle intended than as expressed in words), that until the railway is completed in the parish, that is, until something is completed which will supply the place of the rateable property which has been taken, the deficiency is to be made good. But the Act does not say so. The words are, until the railway is "completed, and assessed or liable to be assessed." What railway? The whole railway mentioned in the Act. And although the interpretation clause is not so clear as in the case of *Reg.* v. *Metropolitan District Ry. Co.* (1), that defect is entirely supplied by the general Act, which is incorporated with it, and which says that the meaning of "railway" shall be the whole undertaking which is made by the authority of the special Act, unless there is something in the special Act to the contrary. Suppose the words here were "the railway by this Act authorized to be made," there could be no doubt; and why should not the word "railway" be so read? I know no reason why it should not. It ought to be so read, unless it leads to something contrary to sense or justice; but I can see no such consequence. The opposite opinion seems to me rather ingenious than sound; I think the plain and ordinary rule of construction ought to be applied. Therefore, the object being the relief of the parish, and that object being fully carried out by the words, I adhere to the judgment of the Queen's Bench, and am of opinion that the judgment of the Exchequer is wrong, and should be reversed.

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(1) Law Rep. 6 Q. B. 698.

BLACKBURN, J. This is a question on which considerable diversity of opinion has arisen on the construction of a very few words in an Act of Parliament. The Court of Queen's Bench, in dealing with words in another Act, which are, as I think, identical in substance with those in the present Act, has put one construction upon them, the Court of Exchequer has put on the words now before us a different construction. I think the decision of the Court of Exchequer wrong, because, according to the rule commonly observed, they should have acted in conformity with the previous decision in the Queen's Bench; but sitting in the Court of Exchequer Chamber, we are entitled to consider what is the true construction, and the result is that, after some hesitation and difficulty, I think the decision in the Queen's Bench wrong, and that the decision of the Exchequer in this case ought to be affirmed.

The present Act incorporates the Lands Clauses Act, 1845, and

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(1) Law Rep. 6 Q. B. 698.

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that Act contains a section (s. 133) so very nearly the same in words, and so entirely the same in spirit with s. 128 of the defendants' Act, that the construction of the former section would very nearly determine the question before us. When a public company takes lands out of which the parish have formerly levied rates, then, on the ground that they take away from the parish the opportunity of continuing to do so, it is reasonable that they should take and occupy those lands subject to the obligation of paying rates, or a sum equivalent to rates, in respect of their occupation, upon an amount equal to the rateable value of the lands at the time when they were taken, that is, the rent at which they might have been let from year to year according to the rule of the Parochial Assessment Act. Therefore s. 133 of the general Act says, that where the promoters of an undertaking become possessed of lands "charged with the land-tax or liable to be assessed to the poor-rate, they shall from time to time, until the works are completed and assessed, or liable to be assessed, to such land-tax or poor-rate, be liable to make good the deficiency in the several assessments for land-tax and poor-rate, by reason of such lands having been taken or used for the purposes of the works." The question is, what do the legislature mean by that? I think their meaning is this: As soon as a public company take land or houses and proceed to pull down the houses and convert the land into their works, inasmuch as there is no longer any beneficial occupation, and the rate is assessed in respect of a beneficial occupation, the rate on these lands and houses amounts to nothing. The site of the New Law Courts is a good example; if a private person were now in possession of the waste ground instead of the government, he would pay nothing, and the parish or parishes would no doubt be heavy losers. Inasmuch, then, as the company is in possession of land, the occupation of which has by their acts ceased to be beneficial, they are liable to make good the deficiency in the rate until the occupiers of the land have become liable again, that is, till the works are completed and assessed. I do not attach much weight to the interpretation clause, but I may observe that the word "works," or "the undertaking," is defined by the interpretation clause of the Lands Clauses Act, 1845 (s. 2), as "the works or undertaking of whatever nature, which shall by the special Act be authorized to be executed;" and in the Railway Clauses Act, 1845 s. 3, "railway" is defined as "the railway and works by the special Act authorized to be constructed." It is not said that the word shall mean the "whole" railway and works so authorized, nor do I think that is what is meant; it simply means that, for instance, with respect to the East London Railway Company, it shall mean the East London Railway, and so with respect to other undertakings. In neither the general Act nor the special Act is the word "whole" introduced.

What is meant, then, is, that when any portion of land has been taken and used for a public undertaking, in consequence of which the parish has lost the rate payable in respect of that land, the deficiency is to be made good by those who take it, until the time arrives when the works on that land are completed; that when on any portion of land forming a portion of the scheme the works are completed, then the liability as to that portion of land is to cease; but not that the liability is to continue till the whole work is completed. Take, for instance, the case of the Liverpool and Birmingham Railway, which was executed in several portions, or the Darlington, Newcastle, and Berwick Railway, on which the line was for years broken by the deep valley of the Tyne, and until the great bridge there was completed, the passengers were carried across the valley in coaches, although all the land had been long since taken and converted into the works of the company. I cannot think that the obligation to make good the deficiency continued over the whole line until that portion was completed. The legislature must have known and had in their view such instances when they laid down a general rule in s. 133 of the Lands Clauses Act, 1845; and I cannot therefore think that when they enacted that section they meant anything more than that when any portion of land was taken for the works, then, until it was so far converted into the works that there was an occupier who could be assessed in respect of that portion of the works, the liability to make good the deficiency should exist.

Then, are there any words in s. 128 of this Act to alter that principle? I can see none. The provision is extended to sewer rates and other rates besides poor-rates, but the principle is not changed. The words are, "until the railway or the works thereof are com-

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pleted and assessed, or liable to be assessed." We may reject the words "liable to be assessed" as surplusage, because, as soon as there is a beneficial occupation, they must be assessed; any ratepayer would be entitled to insist on it, and the overseer would be bound to include it in the assessment. The words are no doubt inserted ex majori cautelâ. Assuming, therefore, the meaning to be what I have stated, as soon as any portion of the East London Railway is completed so far as to be liable to be asssessed as the East London Railway, then in respect of that portion of land on which the railway is so completed, the company have ceased to be liable to make good the deficiency. Taking that view, the contingency has happened. The railway may be carried further, but thus far the line is complete, and the liability to make good the deficiency has ceased. If the opposite construction be adopted, then, if some small portion of the line were not completed within the five years limited by s. 131, it never can be completed at all, and the company are bound for ever to make good the deficiency. I cannot think that this is the effect of the section.

It is certainly strange that the different parishes through which the line runs have different clauses. Shoreditch has a very beneficial one (s. 77. (1)) The Whitechapel clause (s. 109 (2)) is still more favourable to the parish, for the company is to go on making up the deficiency until the whole of the land taken is assessed to the whole amount. One wonders, therefore, that after the advantage granted to Whitechapel, the other parishes did not obtain equally beneficial terms. But I agree with my Brother Mellor, that so far as this argument goes, it shews that it was not intended that the general clause (s. 128) should be construed differently from s. 133 of the Lands Clauses Act, 1845.

If I thought the interpretation clause of much weight I should refer to the phrase "railway or works thereof," and to the clause which occurs both in the Lands Clauses Act (s. 3) and in the Railways Clauses Act (s. 3), that "words importing the singular number only shall include the plural number," and vice versâ; but I must say that I disregard the interpretation clause, because I think it has but little bearing on the question.

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(1) Ante, p. 425.

(2) Ante, p. 426.

The reason of my opinion and judgment is, that it is the fair construction and meaning of the enactment, that when the railway or works upon any particular portion of land are completed, the obligation to make good the deficiency in respect of that land ceases.

Willes, J. This is a question of great nicety. We are called on to put a construction on the expression "railway or works thereof" in s. 128 of the East London Railway Company's Act. That is our task. Now it is a clear rule of grammar and reasoning, that an indefinite or general expression is universal, unless there is something in the context to the contrary. Therefore, to cut down the expression "railway or works thereof" to mean a portion of the railway or works thereof, something is required in the context; the expression taken by itself means the whole railway and the whole works thereof authorized by the Act, and there is no need to interpolate the word "whole"; indefinitum equipollet universali. Starting, therefore, with the supposition that "railway or works thereof" means what it expresses—that is, the railway and works thereof authorized by the Act, I look to the context to see whether there is anything to cut down the expression to a portion. Now it must be admitted there are many places in the statute where the expression must be cut down to a portion, as, for instance, when we are dealing with a section like s. 115, which speaks of the construction of the railway and works. The section begins with using the term in its universal sense, but when it comes to the words "wherever the railway shall be carried across any public carriage road or public street," the context at once cuts down the universality of the expression, and reduces it to mean the railway when crossing a road or street. If then there is anything in s. 128 to cut down the meaning of "the railway or the works thereof" in the same way to "railway within a parish," we must read in those words, as in s. 115 we must read in the words "crossing a road or street."

I agree that the interpretation clauses throw no great light on the matter. We are here considering an Act which deals with seven railways. These are described in s. 22, which authorizes the company to construct, "the railways following, with all proper stations, approaches, works, and conveniences connected therewith." The section then proceeds to enumerate and describe them thus: "Railway No. 1 (Main Line), a railway to commence, &c.;" "Railway No. 2 (City Branch), a railway to commence, &c.," and so on. Here the Act is using the word "railway" in the singular; and whenever the word occurs in connection with such particular conditions as must be attached to a particular portion of the line, it must be read in that limited sense. Now, looking at the interpretation clause of the Act, which deals with the term "railways" in the plural, it cannot be applied to any one of the railways thus separately described as a "railway;" on the contrary, its terms exclude such an application. Nor again, if we go to the interpretation clause of the Railways Clauses Act, does it throw much light on the question; but I cannot say it throws none, for it defines "railway" as meaning "the railway and works by the special Act authorized to be constructed," that is, as I have before observed, the whole railway and works, and there is no reason why we should put in words to limit that meaning if the Act does not. I do not, however, attach much importance to this clause; but I do attach considerable importance to s. 22, for I incline to think that the company is bound to complete the whole of each distinct railway running through any distinct series of parishes before it is relieved from its liability under s. 128, and that may be the reason why the plural number is omitted as noticed by Cleasby, B. (1) It may be then that we shall go right by reading s. 22 and s. 128 together, and considering that each of the railways numbered as distinct railways in s. 22 is to be dealt with as an entirety under s. 128, and to be separately subject to the provisions of that section. And I am disposed so to read them, and to look to the description contained in s. 22 rather than to any other interpretation clause. But if so, then the obvious meaning of s. 128 is, that as to each of those railways the company is to make up the deficiency in the rates until that railway is completed and assessed or liable to be assessed. The company are not bound, unless they think proper, to take the land for any one of those railways; but if they do, they incur the liability imposed by s. 128 with respect to that railway.

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(1) Ante, at p. 253.

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Now, let us consider how the legislature proceed on the application for a railway bill. They hear evidence, shewing that certain public advantages will be derived from the construction of the line, and how it is proposed to secure the interests which will be interfered with by the exercise of the parliamentary powers asked for; and it is by virtue of this evidence that the passing of the Act is obtained. Thus the promoters of the present Act, coming to parliament for powers to make a short line running through several parishes, allege that all public and private interests are to be secured; and of these some are provided for by special sections introduced at the instance of the parishes, and for others provision is made by the general clause in question (s. 128) introduced by the company. Therefore all parties concur as to the inconvenience that may be occasioned to the parishes, and all agree that the liability to be imposed on the company for the remedy of that inconvenience is to last until it is got rid of by s. 128. If they take the land, and do not make the railway, they are to be liable so long as they exist and keep the land to make up the deficiency in the rates. There is therefore no room for reasoning on the inconvenience of this liability continuing for ever; the supposed inconvenience has been disregarded by the legislature; if the period appointed by the Act for making the railway runs out without their being able to raise sufficient funds to complete the work, the statute says that they will still be liable to go on making up the deficiency. That is clear.

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I will not discuss the question of injustice beyond saying that it does not appear to me at all unjust that, the company having taken from the parish what was liable to rates, they should compensate the parish for the loss just as they would a private individual. If they make increased profits, they ought to pay in proportion to those profits. If, on the other hand, these profits are not equal to the former profits of the land, they ought to pay the deficiency; and with great deference to what has been said elsewhere, it appears to me not unjust that the parish should have the advantage of rating at a higher value in the former case, and of being compensated for the deficiency in the latter. At any rate it is the plain intention of the legislature that it should be so, at least until the time when the railway is made through the parish.

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I now come to examine more particularly the words of the section (s. 128), that the company shall "from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates."

Now, what is to be assessed is a railway; and if we could conceive it possible that a railway should be successfully worked within the limits of a parish, I should be more disposed to yield to the argument of the defendants, and say that, although the legislature has not said in terms "until that portion of the railway which lies within a parish is completed," yet we should intend that to be their meaning, and read those words into the statute. But that a railway can be worked successfully within the limits of a parish can scarcely be supposed or suggested. It seems, indeed, to have been thought necessary in the court below as well as here to admit that, in order to come within the section, the railway must be earning money as a railway, or must be in a working state, and that for this purpose there must be other parts completed outside the parish. Is all this to be read into the statute instead of giving to the word "railway" its ordinary meaning of the railway which the company has undertaken to make? I cannot think so; it would be importing into the section a number of particulars not referred to in the Act, and not in the contemplation of the legislature. If you could limit the word "railway" to railway within the parish, well and good; that would carry out the idea of parochiality; but you must, in effect, say, "until the railway is so far completed in connection with stations and with other parts of the line outside the parish as to be a working railway within the parish;" that is, you must describe it with reference not to the parish alone, but to something outside the parish. It seems to me better to abide by the plain meaning of the words of the statute than to examine them curiously for the purpose of giving them a different and limited meaning.

One word as to s. 109. It appears to me that s. 109 is not at all unnecessary, even upon the construction given to s. 128, in the Queen's Bench, namely, that until the railway is completely made there is no answer to the defendants' liability. For by s. 109 the liability is to continue until the assessment of the line equals the

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amount of the gross rateable value of the lands for the twelve months previous to the passing of the Act; but in the parishes which come under the general clause, if the railway is once completed as a system, the rates cannot be increased beyond the sum payable by the company under the Parochial Assessment Act.

The question is, as I have already said, a nice one; but on the plain grammatical meaning of the words used by the legislature, I think that the decision of the Queen's Bench was right, and that the decision of the Exchequer was wrong and should be reversed.

Judgment reversed.

Attorneys for plaintiffs: *Hawks, Willmott, & Stokes.*
Attorneys for defendants: *Wilson, Bristow, & Carpmael.*

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ADMIRALTY COURT JURISDICTION — *Prohibition—Court of Admiralty—Jurisdiction—Suit for Limitation of Liability—Injunction against Action—Arrest of Ship or Proceeds—Money Equivalent to Proceeds — Payment into Court — Merchant Shipping Act*, 1854 (17 *&* 18 *Vict. c.* 104), *s.* 514—24 *Vict. c.* 10, *s.* 13.] The plaintiff, with his luggage, was a passenger, on the 17th of March, 1870, from London to Guernsey, by the defendants' railway and steamer. On the voyage to Guernsey the steamer came into collision with another vessel, and sank, and the plaintiff thereby lost his luggage, and sustained personal injury. He then brought an action for damages against the defendants in the Court of Exchequer. On the 7th and 21st of May, cross causes of damage were instituted in the Court of Admiralty between the defendants and the owners of the other vessel, and 5000*l.* was paid into court by the defendants in lieu of bail. Afterwards on the 30th of May, the defendants commenced a suit, under 24 Vict. c. 10, s. 13, for limitation of their liability to 15*l.* per ton, being the maximum fixed by the Merchant Shipping Act, 1862, s. 54, submitting to bring that sum into court if they were found to blame in the suits for damage. The owners of the other vessel denied the jurisdiction of the Court to entertain the suit, on the ground that at the time of its institution neither the steamer nor her proceeds were under arrest. On the 4th of June the judge ordered, in general terms, that all actions arising out of the collision should be stayed, the plaintiffs (the now defendants) undertaking to admit liability if the judge should pronounce against them in the damage suits. On the 14th of July the judge pronounced that he had jurisdiction; that the defendants were entitled to limited liability, and were liable in respect of loss or injury to the amount, if at all, of 6376*l.*, being at the rate of 15*l.* per ton on the registered tonnage of the steamer, and ordered that sum to be paid into court, and on the 9th of August the defendants paid it in, and admitted liability unconditionally, having on the 30th of July been held in the damage suits to be solely to blame for the collision. On the 22nd of November the defendants made an application to the Court of Admiralty for a specific injunction against the plaintiff's action. The plaintiff then commenced proceedings in prohibition:—*Held*, in the Exchequer Chamber (affirming the judgment of the Court below), 1st. That prohibition still lies to the Court of Admiralty, although it possesses by statute some of the powers of a superior Court; and, secondly, that the plaintiff was entitled to have the prohibition issued, inasmuch as the jurisdiction given to the Court by 24 Vict. c. 10, s. 13, could only be exercised when "the ship or proceeds thereof" were under arrest, and that in this case neither the ship nor her proceeds, nor anything equivalent to her proceeds, were at any time under arrest. James *v.* The South Western Railway Co. **187, Ex. Ch. 287**

ADMISSION OF ATTORNEY—*Attorneys Act*, 1862 (23 & 24 *Vict. c.* 127), *s.* 2—*Graduate of Scotch University—Intermediate Examination—Jurisdiction to entertain Application as to Examination.*] Persons who, without having graduated, are, under 21 & 22 Vict. c. 83, entitled to the same rights and privileges as regards the government of the Scotch universities as Masters of Arts, are not Masters of Arts, within the meaning of 23 & 24 Vict. c. 127, s. 2, so as to be entitled to admission as attorneys after a three years' service.—*Semble* (per Bramwell and Channell, BB.), that the only appeal against the refusal of the examiners under the Attorneys Act to grant a certificate, is to the judges at Serjeants' Inn, and that the Court of Exchequer has no jurisdiction to entertain such an application. *Ex parte* Stewart - 202

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ANNULLING ADJUDICATION—*Bankruptcy Act,* 1869 (32 & 33 *Vict. c.* 71), *ss.* 39, 81—*Property "reverting" to Bankrupt—Mutual Credit—Set-off —Money had and received.*] The defendant having been adjudicated bankrupt on a debtor summons issued by a banking firm of H. & H., a trustee was appointed, who realised the estate, and paid the proceeds into the bank of H. & H. in pursuance of a resolution of creditors. The firm of H. & H. were afterwards adjudicated bankrupts, the sum paid in by the trustee then standing to his credit in their books. Afterwards the order adjudicating the defendant bankrupt was reversed on appeal, and no order was made under s. 81 of the Bankruptcy Act, 1869, as to his property. In an action brought by the plaintiff, as trustee in the bankruptcy of H. & H., against the defendant to recover the amount of his debt to them:—*Held,* affirming the judgment of the Court below, that the defendant was entitled to set off the amount so paid into the bank by the trustee in his bankruptcy. Bailey *v.* Johnson - - - - Ex. Ch. 263

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ASSIGNMENT OF LEASE—*Indemnity—Incomplete Assignment of Term—Landlord and Tenant Occupation under Agreement to Assign—Use and Occupation.*] The plaintiff was tenant to L. of a farm from Michaelmas, 1858, for seven, fourteen, or twenty-one years, at tenant's option, at a rent of 80*l.* a year, payable quarterly. In March, 1869, he purported, by an agreement not under seal, to assign the residue of his interest to the defendant, who entered and occupied the farm; but L. withholding his licence, which was necessary under the plaintiff's lease, no actual legal assignment was ever executed. At Michaelmas, 1870, the defendant quitted the farm, having given L. a notice of his intention to do so. He might have continued to occupy if he had thought proper, but in fact the property stood empty after Michaelmas. The defendant, whilst in occupation, paid rent to L. for the plaintiff. He never was accepted as tenant by L. In March, 1871, the plaintiff paid L., in respect of rent due from the September previous, the sum of 40*l.*, which he now sought to recover from the defendant, either upon an implied indemnity, or by way of rent, or for use and occupation:—*Held,* that he was not entitled to recover, there not having been under the circumstances any promise to indemnify the plaintiff against rent accruing after the defendant's actual occupation had ceased, nor any such relation of landlord and tenant existing between the parties as would entitle the plaintiff to the repayment by the defendant, either as rent or compensation for use and occupation, of the sum paid to L. by the plaintiff. Crouch *v.* Tregonning - - - 88

2. —— *Liability of ultimate Assignee to indemnify original Lessee against Breach of Covenant.*] An assignee of a lease by mesne assignments is under an obligation to indemnify the original lessee against breaches of covenant in the lease, committed during the continuance of his own tenancy; and that obligation is not affected by the covenants which the assignee may have made with his immediate assignor. The plaintiff was lessee of certain premises under a lease containing a covenant to keep in repair. He assigned the lease to B., who assigned it to the defendants. The assignment from the plaintiff to B., and from B. to the defendants, contained express covenants with the immediate assignors respectively, to indemnify them against all subsequent breaches. Whilst the defendants were in possession they committed breaches of the covenant to keep in repair, in respect of which the lessor recovered damages from the plaintiff. In an action to recover over these damages against the defendants:—*Held,* affirming the judgment of the Court below, that the plaintiff was entitled to succeed. Moule *v.* Garrett - - - - Ex. Ch. 101

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AVOIDANCE OF CONTRACT FOR FRAUD—*Return of Consideration—Plea by Carrier of fraud upon Sender of Goods.*] A company sold goods, alleged to be for exportation, to one Adams, for 205*l.*, and took in payment 68*l.* in cash, and his acceptance for the residue. By his direction they forwarded the goods by the defendants' line to the plaintiff at Liverpool, who was alleged by Adams to be his shipping agent. Afterwards, having reason to suspect the solvency of Adams, they directed the defendants to stop the goods in transitu, but this message did not arrive at Liverpool until after the transitus had been determined. The defendants afterwards, at the request of the company, returned them the goods. No act avoiding the contract on the ground of fraud was done by the company until plea in this action. The plaintiff having brought an action against the defendants for the goods, the defendants pleaded fraud in Adams, to which the plaintiff was privy. At the trial, the jury found that Adams obtained the goods with the intention of not paying for them; that the plaintiff had advanced to Adams a sum of 250*l.* (out of which the 68*l.* was paid), but that the advance was not bonâ fide; and that at the time he advanced it he knew of the fraudulent intention of Adams. The judge directed a verdict for the defendants with leave to amend; and with leave to the plaintiff to enter the verdict for him for 205*l.*, if the Court should think that the defendants were not entitled to the verdict, either on the pleas as they stood, or upon any possible amendment thereof. The Court below having made absolute a rule obtained by the plaintiff to enter a verdict for him:—*Held* (reversing the judgment

AVOIDANCE OF CONTRACT FOR FRAUD—*cont.*
of the Court below), that the defendants were entitled to retain their verdict; for that an equitable plea would be good which stated that the goods had been sold to Adams and delivered by the company to the defendants for the purpose of being delivered to the plaintiff under a contract induced by the fraud of Adams, to which the plaintiff was privy; that the company, under a mistaken supposition that the transitu was still subsisting, obtained from the defendants the re-delivery of the goods to them, which was a breach of the contract between the defendants and the plaintiff; but that afterwards, and after action commenced, the company having discovered the fraud, and that the plaintiff was privy to it, did elect to rescind the contract, and revest the property in the goods in themselves, and that this was done before any act was done by them affirming the contract, or otherwise determining their election; that no interest had vested in any innocent person rendering it inequitable or unjust to rescind the contract; and that the plaintiff was inequitably proceeding with the suit for the purpose of obtaining in damages from the defendants on the record and the company, who were the real defendants, the value of the goods thus revested in the company. *Held*, also, that, although in an action by Adams against the company it might have been necessary in pleading a similar plea to have brought into court the money paid by him to them, it was not necessary in this action either to bring the money into court, or to aver readiness and willingness to return the money, inasmuch as Adams was not a party to the action. CLOUGH *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY. [**Ex. Ch. 26**

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COVENANT NOT TO CARRY ON A TRADE—*Construction—"Merchant."*] In an action on a bond, conditioned that the defendant should not "travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise":—*Held* (by Bramwell and Pigott, BB.; Martin, B., doubting), that the condition of the bond was not broken by the defendant's entering into the service, as traveller, of a brewer. Josselyn *v.* Parson - - 127

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DAMAGES FOR NON-DELIVERY—*Contract to deliver Goods at a future Time—Delivery in Monthly Parcels—Measure of Damages.*] The plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, October, and November, 1871. In August, 1871, the defendant gave notice to the plaintiff that he did not intend to deliver any iron. In December, the plaintiff commenced an action for

DAMAGES FOR NON-DELIVERY—*continued.*

non-delivery, and claimed as damages the difference on the 30th of November between the contract and market prices of the iron :—*Held*, that the proper measure of damages was the sum of the differences between the contract and market prices of one-third of 500 tons on the 30th of September, the 31st of October, and the 30th of November, respectively. Brown *v.* Muller - 319

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DEFICIENCY IN RATES—*Liability of Company to make good.*] By the East London Railway Act, 1865, the defendants were authorized to construct a system of railways numbered 1 to 7; and by s. 128 it was enacted that "if and while the company are possessed under this Act of any lands assessed or liable to be assessed to any sewers rate, consolidated rate, poor-rate, police rate, main drainage rate, church-rate, or other parochial or ward rate, they shall, from time to time, until the railway or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates, by reason of those lands being taken or used for the purpose of the railway or works: and the deficiency shall be computed according to the rental at which those lands with any buildings thereon are now rated."—No. 1 railway (which was the principal line) passed through R. parish, and through W. parish. The whole of that part of it which passed through R. parish was completed and actually worked; but the part in W. parish was unfinished, as were also several of the other railways :—*Held* (by Kelly, C.B., Bramwell and Cleasby, BB., Martin, B., dissenting), that the whole of the line within R. parish being complete and capable of being assessed as a working railway, the defendants were no longer liable to make good the deficiency in the rates.—By Bramwell, B.: The same consequence would follow with respect to any portion of the railway which was completed and actually worked; although some other portions within the same parish were unfinished. —By Martin, B.: That the case was concluded by the authority of *Reg.* v. *Metropolitan District Ry. Co.* (Law Rep. 6 Q.B. 698).

In the Exchequer Chamber :—*Held*, by Willes, Keating, Lush, and Brett, JJ. (Blackburn and Mellor, JJ., dissenting), reversing the decision of the Court below, and approving the decision in *Reg.* v. *Metropolitan District Ry. Co.* (Law Rep. 6 Q. B. 698), that the defendants were liable to make good the deficiency in R. parish.—By Keating, Lush, and Brett, JJ., that the defendants were so liable until the whole of the railways authorized by their Act were completed. — By Willes, J., that the defendants were liable in respect of land taken for any one of the seven railways mentioned in s. 22, until that railway was completed.—By Blackburn and Mellor, JJ., that as soon as any portion of the railway was completed, and liable to be assessed as a working railway, the defendants' liability under s. 128 in respect of the land occupied by it ceased. Whitechurch *v.* East London Railway Co.
[248, Ex. Ch. 424

DEFINITE ROUTE—Common carrier - 267
See Common Carrier.

DELIVERY OF CARGO—Perils of the seas
See Perils of the Seas. [Ex. Ch. 98

DEVISE WITHOUT WORDS OF LIMITATION—*Will before* 1838.] By a will, dated before 1838, the testator gave lands to his wife without words of limitation. He also made her executrix and general legatee. And (1) he provided that if his wife should marry again, an inventory should be taken of all the land, goods, &c., before mentioned by certain persons, whom he appointed guardians of his children, with power to take away the goods, &c., and to "reserve" them and the land for the benefit of his childen, until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole, and divide the proceeds equally amongst his surviving children: (2) he directed that "my executrix shall pay my eldest son W. P. the sum of 5*l.* a year for wages so long as he shall continue to labour on the farm after my decease :"—*Held*, affirming the judgment of the Court below, that the widow took the fee.—By Cockburn, C.J., Willes, and Grove, JJ., on the ground that clause 1 disclosed an intention that she should take the fee, subject to the limitation over on her marrying again.—By Blackburn, J., on the ground that the direction to pay 5*l.* a year to W. P. in clause 2 enlarged the estate to a fee.—By Mellor and Brett, JJ., on both grounds. Pickwell *v.* Spencer - - - Ex. Ch. 105

DISCLAIMER—Lease—Bankruptcy - 242
See Disclaimer of Lease.

DISCLAIMER OF LEASE—*Landlord and Tenant—Bankruptcy—Bankruptcy Act,* 1869 (32 *&* 33 *Vict. c.* 71), *s.* 23.] The assignee of a lease became bankrupt, and his trustee disclaimed under s. 23 of the Bankruptcy Act, 1869. In an action brought by the lessor against the lessee upon his covenant in the lease, to recover rent which accrued due between the order of adjudication and the disclaimer :—*Held*, that the lessee was liable; and by Martin and Pigott, BB. (Bramwell, B., dissenting), that a disclaimer under s. 23 by the trustee of the assignee of a lease does not affect the rights and liabilities inter se of the lessor and original lessee. Smyth *v.* North 242

DISTANCE—Measurement of - - 70
See Measurement of Distance.

DISTRESS—Lands not demised - - 327
See Distress on Lands not Demised.

DISTRESS ON LANDS NOT DEMISED—*Landlord and Tenant—Rent-charge—Mines.*] Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall for the time being be in course of working by the lessees, their executors, administrators, and assigns" :—

DISTRESS ON LANDS NOT DEMISED—*continued.*

Held, that this power of distress did not run with lands owned by the lessees at the time of the demise, and through which the mines were worked, so as to bind them in the hands of assignees. Daniel v. Stepney - - - - - 327

DOG—Mischievous animal—Scienter - 325
See Mischievous Animal.

DOUBLE INSOLVENCY—*Claim of Bill-holder—Insolvency of Drawer and Accepter—Bill drawn against specific Cargo—Bill-holder's Right to Proceeds of Cargo—Equitable Rights.*] In the ordinary course of business between P. & Co. and the defendant, P. & Co. bought, on the 14th of September, 1869, a cargo of maize afloat from H., and re-sold it to the defendant on the same day. On the 4th of October they paid H. a deposit of 883*l.* 15*s.*, and drew a bill on the defendant for that amount. The bill having been duly accepted, was discounted by the plaintiffs. As between the defendant and P. & Co. this bill was drawn and accepted on the terms that the proceeds of the cargo should be applied to take it up when due. The defendant, on the cargo arriving, sold it through P. & Co. to C., who closed the sale at their request by paying H. what remained due to him, and taking up directly from him the shipping documents, which had been retained by him. After making this payment a balance of 415*l.* 10*s.* remained in C.'s hands. On the 2nd of December P. & Co. suspended payment and executed an inspectorship deed, to which the plaintiffs assented, and under which they proved. On the 20th of December the defendant executed a composition deed, to which the plaintiffs assented, reserving their rights in respect of the above-mentioned balance. Had P. & Co. not suspended payment, they would have been entitled, according to the custom of dealing applicable to the sale of the cargo, and it would have been their duty to have specifically applied the balance to taking up the bill. The defendant having commenced an action against C. to recover this balance, an interpleader issue was directed between the plaintiffs, who also claimed it, and the defendant. P. & Co. and their trustees under the inspectorship deed were made formal parties to the issue and proceedings, but neither they nor their trustees claimed any interest for themselves in the fund in dispute. On a case stated by judge's order in the course of the interpleader proceedings:—*Held*, that the plaintiffs were entitled to have the sum in C.'s hands applied pro tanto to discharging the bill which they had discounted. Bank of Ireland v. Perry - - - - - 14

DUTY OF OWNER OF LAND—*Trespass—Collecting Water.*] One who for his own purposes so manages his land as to collect there in abnormal quantities anything likely to do mischief if it escapes, is, primâ facie, answerable for the damage consequent upon its escape.—The defendants' mines adjoined and communicated with the plaintiff's, and in the surface of the defendants' land were certain hollows and openings, partly caused by and partly made to facilitate the defendants' workings. Across the surface of their land there ran a watercourse. In November, 1871, the banks of the watercourse (which were sufficient for all ordinary occasions) burst in consequence of exceptionally heavy rains, and the water escaped into and accumuated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks water passed into the defendants', and so into the plaintiff's mines. If the land had been in its natural condition the water would have spread itself over the surface, and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines. In an action by the plaintiff to recover the damage he had sustained:—*Held*, on the principle of *Fletcher* v. *Rylands* (Law Rep. 3 H. L. 330), that the defendants were liable, although they were not guilty of any personal negligence, and although the accident arose from exceptional causes. Smith v. Fletcher - - 305

DUTY OF OWNER OF LAND—*continued.*

EASEMENT—Implied grant - - 298
See Implied Grant of Way.

EAST INDIA COMPANY—Transfer of debts 365
See Petition of Right.

ESTATE TAIL—Inalienable - - - 145
See Inalienable Estate Tail.

ESTOPPEL—Fraud—Money received - 49
See Sham Allotment of Shares.

EVIDENCE—Negligence - - - 130
See Evidence of Negligence.

EVIDENCE OF NEGLIGENCE—*Master and Servant — Dangerous Machinery — Duty to Fence—Contributory Negligence—Knowledge of Danger—7 Vict. c. 15, s. 21.*] B., aged twenty-two, was employed by the defendants, the owners of a "factory" within the meaning of 7 Vict. c. 15, to grease the bearings between the fly and spur-wheel of a steam-engine in their engine-house. In order to do the work he had to stand on a wall 2 ft. 3 in. thick, in a cavity made for the purpose, into which he crawled through the spokes of the fly-wheel: the fly-wheel being on his left hand revolving in a "wheel-race" in the engine-house, and the spur-wheel on his right hand, revolving in another room in the factory. The distance between the spokes of the two wheels was 2 ft. 10 in. There was no fence along the wall edge of the wheel-race, on which B. was placed to do his work, and the fly-wheel, near to which, however, children or young persons were not liable to pass or be employed, was unfenced. At the time of the accident B. had been at the work for five days. On the sixth morning, he was caught by the fly-wheel, whirled into the air and killed. At the trial of an action by his widow and administratrix for pecuniary loss sustained by his death, the jury found that he had not been guilty of contributory negligence, either in undertaking the employment, or whilst engaged upon it, and returned a verdict for the plaintiff. On a rule to set it aside, pursuant to leave, on the ground that there was no statutory duty to fence the place in question, and that the deceased had voluntarily encountered the risk incidental to his employment:—*Held*, 1st, that the defendants were bound under 7 Vict. c. 15, s. 21, to fence the place where B. had to stand, it being the edge of a wheel-race not otherwise secured; and, secondly, that the dangerous character of the employment

EVIDENCE OF NEGLIGENCE—*continued.*

was not so obvious as that he must necessarily be taken to have known it; or that, even assuming he did know it, that circumstance alone was not enough to constitute him a "volunteer" in such a sense as to exonerate the defendants from liability for the consequences of their breach of their statutory duty. *Semble*, that the 7 Vict. c. 15, s. 21, imposed on the defendants an unqualified duty to fence the fly-wheel, whether children were liable to pass or be employed near it or not. Britton *v.* Great Western Cotton Company [130

EVIDENCE—Scienter - - - 325
See Mischievous Animal.

EXECUTION CREDITOR—*Bankruptcy Act,* 1869 —*Seizure and Sale—Seizure before Act of Bankruptcy—Sale after Adjudication.*] An execution creditor for a sum less than 50*l.*, who has seized the goods of a bankrupt before the committing of any act of bankruptcy, is entitled to the proceeds of them as against the trustee, although the adjudication is prior to the sale. Judgment of the Court below affirmed, and *Ex parte Rocke* (Law Rep. 6 Ch. App. 775) followed. Slater *v.* Pinder **Ex. Ch. 95**

EXECUTOR—Liability - - - 84
See Executor de Son Tort.

—— Partnership - - - - 218
See Partnership.

EXECUTOR DE SON TORT—*Liability for Breaches of Contract by Person with whose Assets Executrix de son Tort has intermeddled.*] The executor of an executrix de son tort is not liable for a breach of contract committed by the person with whose property the executrix de son tort has intermeddled. Wilson *v.* Hodson - - 84

FI. FA.—Seizure and sale - - **Ex. Ch. 95**
See Execution Creditor.

FIXED TERMINI—Common carrier - 267
See Common Carrier.

FORBEARANCE FROM LEGAL PROCEEDINGS — *Contract — Consideration — Guarantee —Withdrawal of Petition.*] The plaintiff having presented a petition for winding up a company, the defendants signed the following guarantee: "In consideration of your withdrawing the petition you have presented for winding up the company called John King & Co., Limited, we agree to pay you all the costs you have incurred of and in relation to such petition, and to indemnify you against all costs (if any) you may be liable to pay to the company, or to any other parties appearing for or in reference to the petition. We further agree to guarantee the payment to you, within eighteen months from this date, by the company or the liquidator thereof, of the principal of your debt of 722*l.*" In an action on the second branch of the guarantee:—*Held*, that the consideration applied to both promises; that the consideration was the withdrawal of the then pending petition, and not the forbearing for eighteen months to proceed with any petition to wind up the company; and that such a consideration was sufficient to support the promise. *Ross* v. *Moss* (Cro. Eliz. 560) questioned. *Quære*, whether, if the presenting of a second petition had had the effect of preventing the company from paying the debt, the surety would have been discharged. Harris *v.* Venables - - - - - 235

FRAUD—Contract—Avoidance - **Ex. Ch. 26**
See Avoidance of Contract for Fraud.

—— Sham allotment of shares - - 119
See Sham Allotment of Shares.

FRAUDS, STATUTE OF—*Sale of Goods—Memorandum in Writing*—(29 *Car.* 2, *c.* 3), *s.* 17.] The plaintiff on the 11th of January, 1871, bought of the defendant a parcel of wool, worth more than 10*l.*, "the whole to be cleared in about twenty-one days." A memorandum of the terms of the bargain was handed by the plaintiff to the defendant. None of the wool was delivered, and there was no part payment of the price. On the 8th of February the defendant wrote, "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract. The plaintiff had, in fact, completed his part on the true construction of the contract. On the 9th of February, in answer to the plaintiff's request to see a copy of the contract contained in the memorandum of the 11th of January, the defendant wrote in these terms, enclosing a copy:—"I beg to enclose copy of your letter of the 11th of January." In an action for non-delivery of the wool:—*Held*, in the Exchequer Chamber (affirming the judgment of the Court below), that the letter of the 9th, with its enclosure, taken in connection with that of the 8th, constituted an unambiguous recognition of the existence of the contract and of its terms; and that there was, therefore, a sufficient memorandum in writing signed by the defendant to satisfy the Statute of Frauds, s. 17. Buxton *v.* Rust **1, Ex. Ch. 279**

FRAUDULENT CONVEYANCE—27 Eliz. c. 4 **313**
See Voluntary Conveyance.

GENERAL AVERAGE—*Ship—Spars used for Fuel.*] The plaintiff's ship sailed from Melbourne for London, having on board (as is usual with sailing vessels on this voyage) a donkey-engine, which was equivalent to ten additional men, and without which (or the ten additional men) she would not have been seaworthy. The engine was used for pumping and also for other ship's purposes. The ship had on board a sufficient stock of coals for an ordinary voyage, and was expressly found to be seaworthy. On the 10th of March she encountered bad weather, which continued till the 1st of April, and then moderated. During this time she strained, and made much water, and she continued afterwards to leak; the water could only be kept under by pumping, and for this purpose it was necessary to use the engine, without which she could not have been kept afloat.—On the 16th of April the stock of coals was reduced to one and a half tons, and the captain, in order to obtain fuel, directed some spare spars and wood, which were part of the ship's stores, to be cut up to burn with the coal; wood alone would not have sufficed to get up the

GENERAL AVERAGE—*continued.*

steam. On the 5th of May the ship obtained some coal from a passing vessel, and on the 16th put into port to obtain a further supply. On arriving in the Thames the engine broke down from overwork.—The ship was exposed to no serious risk from the water she made while there was sufficient fuel on board to work the engine.—The plaintiff claimed from the defendants, who were owners of cargo, a general average contribution in respect of, 1. The spars and wood; 2. The extra coal; and, 3. The injury to the donkey-engine:—*Held*, by Kelly, C.B., and Bramwell, B., that the facts shewed an imminent peril requiring the sacrifice of the spars and wood, and that the plaintiff was therefore entitled to a general average contribution in respect of them; but that he was not so entitled in respect of the coal or the injury to the donkey-engine.—By Martin and Cleasby, BB., that no such emergency had occurred as to entitle the plaintiff to a general average contribution in respect of any of the above matters. Harrison *v.* Bank of Australasia - - - - - - 39

GENERAL INTENT—*Will—Estate to be enjoyed by one Person—" All and every other the Issue of my Body "—" Other the Issue "—Words of exclusion or completion—" For default of such Issue."*] A testator devised his hereditaments to his son for life, with remainder to F., his son's eldest son, for life, with remainder to the first and other sons of F. successively in tail male; and for default of such issue, to R., the second son of his son, for life, with remainder to the first and other sons of R. successively in tail male; and for default of such issue, to the third, fourth, and other sons of his son thereafter to be born successively in tail male; and for default of such issue, to his daughter I. for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter E. for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter J. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth and fifth and other daughter or daughters of his son successively, and in remainder one after another, and to the heirs male of their bodies; and for default of such issue, " to the use and behoof of all and every other the issue of my body"; and for default of such issue to his right heirs. The will also contained a wish that the estates should be retained in the hands of one person, and should not be dispersed, and a provision that any female who inherited should with her husband (if married) assume the testator's name and arms under the penalty of forfeiting the estates. A muniment box was directed to go to the person entitled from time to time to the estates:—*Held*, 1st, that the words " issue of my body " in the penultimate limitation were to be read in the same sense as " heirs of my body;" 2ndly, that, having regard to the whole will, that devise could not be read as giving the estate per capita in joint-tenancy to all who came within the class at the time the estates vested in possession; 3rdly, that the words " all and every" did not import that all were to take at the same time, but were satisfied by all taking in succession; and 4thly (Bramwell, B., dissentiente), that the word " other " was to be read not as a word of exclusion, but of completion; and that, upon these principles of construction, there was, by virtue of the penultimate limitation, a vested remainder at the death of the testator in tail general to which his son then became entitled.—This remainder descended to F., who duly executed a disentailing deed. He devised the estate to the defendant's father, from whom it descended to the defendant. In actions of ejectment, (a) by persons claiming as issue of the body of the testator as joint tenants per capita at the time the estates vested in possession, (b) by the heiress in tail general of the testator at the same period, (c) by the heir of the survivor of all the issue of the testator living at his death (other than these included in the particular limitations), and (d) by the heir in tail of the testator at his death, those being excluded who came within the particular limitations:—*Held*, that the defendant was entitled to judgment.—*Mandeville's Case* (Co. Litt. 26 b.) considered. Allgood *v.* Blake. Roach *v.* Blake. Clennell *v.* Blake. Reed *v.* Blake - - - - - 339

GIFT TO A CLASS—Will—Construction [Ex. Ch. 271
See Rule in Shelly's Case.

GOODS, SALE OF—Damages - - 319
See Damages for Non-delivery.

GRADUATE OF SCOTCH UNIVERSITY—Admission of attorney - - - 202
See Admission of Attorney.

GRANT, IMPLIED—Way - - - 298
See Implied Grant of Way.

GUARANTEE—Consideration—Forbearance 235
See Forbearance from legal Proceedings.

HACKNEY CARRIAGE—*Construction—Street—Towns Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *ss.* 3, 38—*Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 2.] In a district to which the Local Government Act, 1858, applied, a piece of ground adjoining a railway station, and belonging to the company, metalled and separated from the highway only by a gutter, was used as an approach to the railway station. Private carriages were allowed to stand there, but no hackney or public carriages, except those of the appellant; the appellant, by agreement with the company, having the sole right of standing carriages there for the purpose of plying for hire. The appellant having been convicted in a penalty for allowing his carriages to ply there for hire without a licence:—*Held*, that the place was not a " street" within the meaning of s. 3 of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), for that the places included by that section in the word " street " were places over which the public had a right of passage; and that the conviction was therefore wrong. Curtis *v.* Embery - 369

INALIENABLE ESTATE TAIL—*Statute of Limitations* (3 *&* 4 *Wm.* 4, *c.* 27), *ss.* 2, 21.] By a private Act of 2 & 3 Ph. & M. certain lands were limited to E. N. and others successively in tail male, with limitations over, and an ultimate limitation to the Crown; and it was provided that "no feoffment, discontinuance, fine, or recovery, with voucher or otherwise, or any other act or acts thereafter to be made, done, suffered, or acknowledged of the premises, or any part or parcel thereof," by E. N., or the other persons named, "or by any of them, or by any of their heirs male of their several bodies, ... should bind or conclude, or put from entry," the Crown, "or any of the heirs in tail."—A lease for three lives was made in 1781, by the heir in tail male of E. N., then in possession, of part of the lands so settled; the lease expired in 1832, and since that time the land had been held by the defendant, and those through whom he claimed, without payment of rent or acknowledgment of the title of the tenants in tail for the time being. In an action brought by the present heir in tail male of E. N. to recover the land :—*Held* (by Channell and Cleasby, BB.; Bramwell, B., dissenting), that the plaintiff was not barred by 3 & 4 Wm. 4, c. 27 :—*Semble*, the section of 3 & 4, Wm. 4, c. 27, which bars issue in tail is s. 2, and not s. 21. Earl of Abergavenny *v.* Brace - - 145

IMPLIED GRANT—Easement - - 298
See Implied Grant of Way.

IMPLIED GRANT OF WAY—*Easement—Way.*] By a lease, under which the defendant claimed as assignee, S. demised "all that plot of land, bounded on the east and north by newly-made streets" (and on the west and north by other premises of the lessor and his tenants, through which there was no way), "a plan whereof is indorsed on these presents." On the indorsed plan the site of the new streets was shewn, and was marked as "new streets." The lease contained covenants by the lessee to build two houses on the land, and "to kerb the causeways adjoining the said land."—S. afterwards granted to the plaintiff a lease of the land comprised in the site of one of the proposed new streets (which had, in fact, never been made into a street), and the plaintiff enclosed the land, so that the defendant was unable to reach the east side of his premises.—In an action against the defendant for pulling down this obstruction :—*Held*, that under the defendant's lease a right of way was granted along the site of the proposed new streets to his premises. Espley *v.* Wilkes - 298

INDEMNITY—Assignment of lease 88, **Ex. Ch.** 101
See Assignment of Lease. 1, 2.

INDIA—Debts of East India Company - 365
See Petition of Right.

INFRINGEMENT OF PATENT—Inspection of documents - - - - 207
See Production of Documents.

INHERENT VICE—Animal—Carrier - 373
See Carrier of Animals.

INJUNCTION—Restraining action—Prerogative of Crown - - - - 177
See Prerogative of Crown.

INSOLVENCY—Bill of Exchange - - 14
See Double Insolvency.

INSPECTION OF DOCUMENTS - - 207
See Production of Documents.

JURISDICTION—Admiralty 187, **Ex. Ch.** 287
See Admiralty Court Jurisdiction.

—— Admission of attorney—Appeal - 292
See Admission of Attorney.

LANDLORD AND TENANT—Bankruptcy—Disclaimer - - - - 242
See Disclaimer of Lease.

—— County court—Order for possession - 55
See Order for Possession.

—— Distress - - - - - 327
See Distress on Lands not Demised.

—— Lease—Assignment - 88, **Ex. Ch.** 101
See Assignment of Lease. 1, 2.

LEASE—Assignment - - 88, **Ex. Ch.** 101
See Assignment of Lease. 1, 2.

—— Disclaimer—Bankruptcy - - 242
See Disclaimer of Lease.

LEGACY DUTY—36 *Geo.* 3, *c.* 52, *s.* 19—*Money to be laid out in Land—Unconverted Fund falling into Possession.*] A testator, who died in 1800, by his will bequeathed to trustees a fund to be laid out in land, which was to be conveyed to the use of C. (his eldest son) for life, remainder to C.'s first and other sons in tail male, remainder to J. (his second son) for life, remainder to J.'s first and other sons in tail male, remainder to his own right heirs.—C. and J. died without issue and intestate, and S., the testator's only daughter, became entitled to the fund, being heir-at-law to the testator, as well as to C. and J. She died intestate, and at her death, the fund, which had never been invested in land, passed to E., who was grandnephew of the testator and heir-at-law of the testator and of C. J. and S. :—*Held* (affirming the judgment of the Court below), that under s. 19 of 36 Geo. 3, c. 52, duty was payable by E. at 5 per cent. as on a bequest from S. De Lancey *v.* The Queen - - - - **Ex. Ch.** 140

LICENCE—Slaughter-house—Corporation
See Slaughter-house. [**Ex. Ch.** 399

LIMITATION—Words of—Devise **Ex. Ch.** 105
See Devise without Words of Limitation.

LIMITATION OF LIABILITY—Suit for [187, **Ex. Ch.** 287
See Admiralty Court Jurisdiction.

LIMITATIONS, STATUTE OF—Estate tail 145
See Inalienable Estate Tail.

MACHINERY—Negligence—Master and servant
See Evidence of Negligence. [130

MANOR—Custom—Prerogative - - 177
See Prerogative of Crown.

MARRIAGE—Breach of promise **Ex. Ch.** 111
See Promise of Marriage.

MASTER AND SERVANT—Machinery—Negligence - - - - 130
See Evidence of Negligence.

—— Seduction - - - - 283
See Seduction.

MASTER OF ARTS—Attorney—Admission 202
See Admission of Attorney.

MEASURE OF DAMAGES—Non-delivery of goods
See Damages for Non-delivery. [319

—— Remoteness - - - - **Ex. Ch. 96**
See Proximate Cause of Injury. 1.

MEASUREMENT OF DISTANCE—*Covenant not to carry on Trade within a specified Distance—Distance "as the Crow flies"—Nearest Mode of practicable Access.*] The defendant covenanted with the plaintiff not to carry on the business of a publican within half a mile of the plaintiff's premises. He afterwards carried on that business within half a mile, if the distance were measured in a straight line, "as the crow flies," but not within half a mile, if the distance were measured by the nearest mode of practicable access:—*Held* (by Martin and Channell, BB., Cleasby, B., dissenting), that there had been a breach of the covenant. Mouflet *v.* Cole - - 70

MEMORANDUM IN WRITING—Statute of Frauds
See Frauds, Statute of. 1. [**Ex. Ch.** 279

"MERCHANT" - - - - - 127
See Covenant not to carry on a Trade.

MERCHANT SHIPPING ACT, 1854, s. 514. 187.
[**Ex. Ch.** 287
See Admiralty Court Jurisdiction.

MINES - - - - - - 327
See Distress on Lands not Demised.

—— Support of surface - - - - 379
See Support.

MISCHIEVOUS ANIMAL—*Evidence of Scienter.*] If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master. Baldwin *v.* Casella. [325

MISJOINDER OF PARTIES—Amendment 143
See Amendment in County Court.

MONEY RECEIVED—Fraud - - 119
See Sham Allotment of Shares.

MONEY TO BE LAID OUT IN LAND—Legacy duty - - - - [**Ex. Ch.** 140
See Legacy Duty.

NEGLIGENCE—Damage—Remoteness **Ex. Ch.** 96
See Proximate Cause of Injury. 1.

—— Evidence - - - - - 130
See Evidence of Negligence.

—— Proximate cause of injury - **Ex. Ch.** 247
See Proximate Cause of Injury. 2.

—— Water—Action - - - - 305
See Duty of Owner of Land.

"ORDER FOR POSSESSION"—*Landlord and Tenant—Trespass—Delivery of Possession by Order of the County Court under 19 & 20 Vict. c. 108, ss. 50, 51.*] An order for delivery of possession made by the County Court under 19 & 20 Vict. c. 108, s. 50, does not affect the rights of a person not a party to the proceedings; and,—*Semble*, it does not affect the rights of the person against whom it is made:—*Held*, therefore (by Channell and Pigott, BB., Martin, B., dissenting), that the defendant, who had obtained such an order in a proceeding against one Usher, his tenant, was liable to an action of trespass brought by the plaintiff, who was tenant to Usher. Hodson *v.* Walker - - - - - - 55

PARTNERSHIP—*Sharing Profits—Liability as Partners of Executors of a Deceased Partner—Partnership Act*, 1865 (28 & 29 *Vict. c.* 86.) By articles of partnership T. F., W. F. and S. agreed to carry on the business of auctioneers in partnership for seven years; they were to contribute capital and to share profit and loss equally; and if either died during the partnership term, the surviving members of the firm were to continue the business, and were to pay to the personal representatives of the deceased partner the share of the profits to which he would have been entitled if living. T. F. died during the partnership term. At the time of his death the firm had no capital, except office furniture and fittings, worth about 100*l.* They had in their hands a sum of between 400*l.* and 500*l.*, which was the proceeds of debts due to a former firm in which T. F. was a member, and left in the hands of the new firm for collection; and this sum belonged beneficially to T. F.; T. F. was also entitled in respect of his share of profits, beyond the amounts which he had drawn, to a sum of about 200*l.* After the death of T. F., the surviving members of the firm continued to carry on the business, to collect the debts due to the old firm, and to earn profits. The executors of T. F. never interfered in the business, but they claimed, under the articles of partnership, the share of profits to which T. F. would have been entitled if living. No settlement of accounts in respect of T. F.'s interest in the partnership business was made between his executors and the surviving partners. Sums of money amounting in the whole to about 625*l.* were from time to time paid by the firm to the executors; these payments were made generally, and not on any particular account.—After the death of T. F., the firm were employed by the plaintiff to sell property; they sold the property and received the proceeds, but did not pay over the same to the plaintiff. In an action brought (after the death of S.) against the executors of T. F. and W. F.:—*Held*, that the executors of T. F. were not liable as partners.—The Partnership Act, 1865 (28 & 29 Vict. c. 86), considered. Holme *v.* Hammond - - - 218

PARTNERSHIP ACT, 1865 - - 218
See Partnership.

PATENT—Inspection of documents - 207
See Production of Documents.

PAYMENT INTO COURT—Admiralty Court.
[187, **Ex. Ch.** 287
See Admiralty Court Jurisdiction.

PERILS OF THE SEAS—*Vendor and Purchaser—Condition Precedent—Receipt of Bills of Lading—Delivery of Cargo—Agreement that Purchaser shall bear Risks and Dangers of the Seas.*] The plaintiffs agreed with the defendant to ship on board a vessel a cargo of fresh-water ice, and to dispatch the vessel with all speed to any ordered port in the United Kingdom, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof, the purchaser takes upon himself all risks and dangers of the seas;" and the defendant agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery, at the rate of 20*s.* a ton of 20 cwt., weighed on board during delivery. The vessel was lost during the voyage by risks and dangers of the seas, within

PERILS OF THE SEAS—*continued.*
meaning of the agreement, and after the receipt by the defendant of the bills of lading. The plaintiffs having brought an action against the defendant to recover the value of the cargo:—*Held*, reversing the judgment of the Court below, that the plaintiffs were entitled to recover. Castle *v.* Playford - - - Ex. Ch. 98

PETITION FOR WINDING-UP—Withdrawal of [235
See Forbearance from Legal Proceedings.

PETITION OF RIGHT—21 & 22 *Vict. c.* 106 (*Act for the better Government of India,* 1858)—*Annexation of Province—Sovereign Power—Transfer of Debts.*] The suppliant, by petition of right, sought to recover from the Crown a debt alleged to have become due to the person whom he represented, from the Sovereign of Oude, before that province was annexed in 1856 to the territories of the East India Company:—*Held*, that assuming the East India Company became liable to pay the debt by reason of the annexation of the province, the Secretary of State in Council for India, and not the Crown, was, by the provisions of the "Act for the better Government of India, 1858," the person against whom the suppliant must seek his remedy. Frith *v.* The Queen - 365

POOR RATE—Deficiency—Railway company [248, Ex. Ch. 424
See Deficiency in Rates.

POSSESSION, ORDER FOR—County Court 55
See Order for Possession.

PRACTICE, COMMON LAW—Amendment 143
See Amendment in County Court.

—— Inspection of documents - - 207
See Production of Documents.

PRACTICE, COUNTY COURT—Amendment 143
See Amendment in County Court.

PREROGATIVE OF CROWN—*Right of Sovereign to Injunction to restrain Action—Manorial Rights—Custom of Manor.*] The Queen, as lady of a manor, granted to two licensees, in pursuance of certain alleged manorial rights, power to enter the lands comprised in the manor and search for and carry away minerals, making to the copyholder and terre-tenant respectively a customary compensation for surface damage. The licensees entered without the consent of either copyholder or terre-tenant and began mining operations; whereupon the terre-tenant commenced an action of trespass against them. The Attorney General, on behalf of the Queen and the licensees, then filed an information and bill on the equity side of the Exchequer against copyholder and terre-tenant, praying that the rights of the Crown within the manor should be declared, and that the action of trespass should be restrained. On an application for an injunction in accordance with the prayer of the information and bill:—*Held*, that the rights of the Sovereign being involved in the proceedings in the action, the Sovereign was entitled *jure coronæ* to be actor in any litigation affecting those rights, and that the injunction must therefore issue. Attorney-General *v.* Barker. - 177

PRODUCTION OF DOCUMENTS — *Patent — Infringement—Account—Appeal—Inspection.*] The plaintiffs obtained a verdict in an action for the infringement of a patent; a rule to enter the verdict for the defendants was discharged; and the defendants appealed. An order was afterwards made for an account of profits, which was not appealed against, but on the parties appearing before the master for the purpose of taking the account, the defendants refused to produce their books. The Court made absolute a rule for production and inspection of the defendants' books, and for interrogatories to the defendants, notwithstanding the pendency of the appeal. Saxby *v.* Easterbrook - - - - - 207

PROFITS, SHARE OF—Partnership - 218
See Partnership.

PROHIBITION—Admiralty Court 187, Ex. Ch. 287
See Admiralty Court Jurisdiction.

PROMISE OF MARRIAGE—*Breach of Contract by refusal to perform, the Time for Performance not having arrived.*] The defendant promised to marry the plaintiff so soon as his (defendant's) father should die. During the father's lifetime the defendant refused absolutely to marry the plaintiff. The plaintiff sued for breach of the promise, the defendant's father being still alive:—*Held*, reversing the judgment of the Court below, that the principle of *Hochster* v. *De La Tour* (2 E. & B. 678; 22 L. J. (Q.B.) 455) was applicable to the case of such a promise to marry, and that a breach of contract had been committed on which the plaintiff could sue. Frost *v.* Knight Ex. Ch. 111

PROPERTY PASSING—Sale of goods Ex. Ch. 98
See Perils of the Seas.

PROXIMATE CAUSE OF INJURY—*Damages—Remoteness—Injury resulting from two Independent Causes—Negligence—Breach of Contract or Duty—Measure of Damages.*] The defendants, a gas company, contracted to supply the plaintiff with a proper service pipe to convey gas from the main outside to a meter inside his premises. Gas escaped from the pipe laid down under the contract into the plaintiff's shop. The servant of a gasfitter employed by the plaintiff happened to be at work in another room at the time of the escape, and went into the shop upon hearing of it with a view of finding out its cause. He was carrying a lighted candle in his hand, and immediately on entering the shop an explosion took place, doing damage to the plaintiff's stock and premises. On the trial of an action against the defendants for their breach of contract in not supplying a proper service pipe, the jury found, first, that the escape of gas was occasioned by a defect in the pipe, and that that defect existed in the pipe when supplied; and, secondly, that there was negligence on the part of the gasfitter's servant in carrying a lighted candle. Under these findings:—*Held*, affirming the judgment of the Court below, that the plaintiff was entitled to recover, and that the defendants were not relieved from liability by the negligent act of the gasfitter's servant. Burrows *v.* The March Gas and Coke Company - Ex. Ch. 96

2. —— *Negligence—Natural Forces.*] The defendants' vessel, owing to the negligence of their servants, struck on a sand bank, and becoming from that cause unmanageable, was driven by wind and tide upon a sea wall of the plaintiffs', which it damaged. Having regard to the state of the

PROXIMATE CAUSE OF INJURY—*continued.*

weather and tide it was impossible to prevent this, the ship having once struck:—*Held*, affirming the judgment of the Court below, that the defendants were liable for the damage caused to the wall. The Lords Bailiff-Jurats of Romney Marsh *v.* The Corporation of the Trinity House [**Ex. Ch. 247**

PUBLIC HEALTH ACT, 1848 - - **369**
See Hackney Carriage.

RAILWAY COMPANY—Animal—Inherent vice
See Carrier of Animals. [**373**

—— Rates—Deficiency - **248, Ex. Ch. 424**
See Deficiency in Rates.

RATES—Deficiency—Railway company [**248, Ex. Ch. 424**
See Deficiency in Rates.

—— Water—Rent - - - - **409**
See Rent.

REFUSAL TO PERFORM CONTRACT - **259**
See Breach of Charterparty.

REMOTENESS OF DAMAGES [**Ex. Ch. 96, Ex. Ch. 247**
See Proximate Cause of Injury. 1, 2.

RENT — *Water-rate — Annual Value — Landlord paying Rates.*] By their local Act (16 Vict. c. xxii.), s. 79, the plaintiffs were bound to supply the houses within a certain district with water, "at the following rate per annum, that is to say, where the *rent* of such dwelling-house" should not amount to 7*l.* per annum, at a rate not exceeding 6 per cent. per annum on such *rent*, but not exceeding 7*s.* 2*d.* per annum; and so on in a graduated scale. —The defendant was owner of numerous small houses supplied with water by the plaintiffs, in respect of which he paid, either under statutory obligation or by voluntary agreement, the poor-rate, water-rate, and district rate:—*Held*, that *rent* in s. 79 was equivalent to *annual value*, and that in estimating the rents on which the water-rate was payable, the defendant was entitled to deduct the rates so paid by him.—*Rook* v. *Mayor, &c., of Liverpool* (7 C. B. (N.S.) 240) distinguished. Sheffield Waterworks Co. *v.* Bennett - **409**

RESTRAINING ACTION—Prerogative of Crown
See Prerogative of Crown. [**177**

RETURN OF CONSIDERATION—Fraud **Ex. Ch. 26**
See Avoidance of Contract for Fraud.

RETURN OF GOODS—Breach of warranty - **7**
See Warranty on Sale.

REVERTING OF PROPERTY—Bankruptcy [**Ex. Ch. 263**
See Annulling Adjudication.

RIGHT OF WAY—Implied grant - - **298**
See Implied Grant of Way.

RIGHT, PETITION OF - - - **365**
See Petition of Right.

RULE IN SHELLY'S CASE—*Will—Child "born or to be born"—Gift to a Class.*] A testator, by a settlement made on the marriage of his daughter, covenanted with trustees to leave an equal child's share of certain freehold property to the use of her husband for his life, or until insolvency, with remainder to her use for life, remainder to the issue of the marriage with specified limitations; and if there should be no issue, or there being issue all should die under twenty-one years of age, then to the use of her heirs "as if she had died sole and unmarried." His will recited the settlement, and the limitations contained in the will substantially coincided with those contained in the settlement. The ultimate limitation was as follows: "And in case every child born, or to be born, shall die under the age of twenty-one years and without leaving issue, to the use of the heirs and assigns of E. A. V. (the daughter) as if she had continued sole and unmarried," with remainder to the testator's right heirs. There were three children born of the marriage. Two died in infancy, and previous to the date of the will; one was alive at that time, and lived until the age of twenty-three. He predeceased the testator, who died in 1849. The husband of E. A. V. became insolvent in the following year. E. A. V. died in 1868. In ejectment by the plaintiff, who filled the double character of heir-at-law of the testator and of E. A. V., against the defendant, an assign of E. A. V.:—*Held*, affirming the judgment of the Court below, that the ultimate limitation never took effect, and that the plaintiff was entitled to recover as heir of the testator.—*Tarbuck* v. *Tarbuck* (4 L. J. (N.S.) Ch. 129) approved. Brookman *v.* Smith **Ex. Ch. 271**

SALE, CONVEYANCE ON—Stamps - **211**
See Stamps.

SALE OF GOODS—Breach of warranty—Return of goods - - - - **7**
See Warranty on Sale.

—— Fraud - - - - **Ex. Ch. 26**
See Avoidance of Contract for Fraud.

—— Measure of damages - - - **319**
See Damages for Non-delivery.

—— Memorandum in writing **1, Ex. Ch. 279**
See Frauds, Statute of.

—— Risks of perils of the seas - **Ex. Ch. 98**
See Perils of the Seas.

SALE OF LAND—Title—Voluntary conveyance
See Voluntary Conveyance. [**313**

SCIENTER—Evidence—Dog - - **325**
See Mischievous Animal.

SCOTCH UNIVERSITY—Graduate—Admission of attorney - - - - **202**
See Admission of Attorney.

SECRETARY OF STATE—India - - **365**
See Petition of Right.

SEDUCTION—*Master and Servant—Loss of Service —Service at Period of Seduction and of Confinement.*] The plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three days' visit, with her employer's permission, to the plaintiff, her mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother. In an action for her seduction brought by the mother:—*Held* (by Kelly, C.B., Martin, Bramwell, and Channell, BB.), that there was no evidence of service at the time of the seduction; and that, therefore, the action was not maintainable.—By Kelly, C.B., and Martin and Bramwell, BB., that the action must also fail on the ground that the confinement did not take place whilst the daughter was in the plaintiff's service. Hedges *v.* Tagg - - **283**

SEIZURE AND SALE—Execution - **Ex. Ch. 95**
See Execution Creditor.

SERVICE—Seduction - - - 283
See Seduction.

SET-OFF—Bankruptcy—Adjudication annulled [**Ex. Ch. 263**
See Annulling Adjudication.

SHAM ALLOTMENT OF SHARES — *Money received—Fraud—Contrivance to procure Settling Day—Restoration of Money actually paid by Innocent Parties—Estoppel.*] The plaintiffs, a telegraph company, invited applications for shares, received some in the ordinary way and allotted some, on which deposits were paid. The number allotted was, however, insufficient to procure a settling day on the Stock Exchange, and some of the directors of the company, S., the promoter, and C., the defendants' manager, agreed, in order that the defendants might certify to the committee of the Stock Exchange the requisite amount of shares to have been subscribed, that an account should be opened in S.'s name with the defendants, and another account in the plaintiffs' name; that the plaintiffs should guarantee to the defendants the repayment of any money drawn by S., and charge with such repayment any balance in their favour; that the defendants should have a bonus of 600*l.*, and C. of 1000*l.*; that S. should get persons to apply for shares, which should be duly allotted, and should draw on his account for, and pay into the plaintiffs' account the requisite deposits, taking blank transfers from the pretended allottees. This plan was carried out. Accounts were opened, that in the plaintiffs' name with 1500*l.* really paid in; that in S.'s name with a loan of 1500*l.* from the defendants. Sham applicants were obtained by S.. and shares allotted to them. S. thereupon drew on his account, and with the proceeds paid the requisite deposits into the plaintiffs' account. The pretended allottees, immediately after the shares were allotted, handed blank transfers to S. Finally the plaintiffs' account with the defendants stood with a credit of 24,505*l.* 18*s.* 6*d.*, made up of the 1500*l.* really paid in and the pretended deposits. S.'s account stood with a debit of 24,506*l.* 8*s.* 4*d.*, made up of the sums he had drawn and the 1500*l.* loan. No settling day was ever granted: and the plaintiffs' company afterwards went into liquidation under a winding-up order. In an action by the plaintiffs to recover the whole amount to their credit, the defendants paid their bonus of 600*l.* into court, and denied liability as to the residue:—*Held*, that the plaintiffs were entitled to the 1500*l.* actually paid by them to the defendants, but no more; and that judgment must therefore be given for them for 900*l.* *Gray* v. *Lewis* (Law Rep. 8 Eq. 526) distinguished. The British and American Telegraph Company *v.* The Albion Bank - 119

SHARES—Charging order - - - 332
See Charging Order on Shares.

—— Sham allotment—Fraud - - 119
See Sham Allotment of Shares.

SHARING PROFITS—Partnership - 218
See Partnership.

SHIP—General average - - - 39
See General Average.

SHIP—*continued.*

—— Perils of the seas - - **Ex. Ch. 98**
See Perils of the Seas.

SLAUGHTER HOUSE — *Corporation filling two Capacities—Licence to erect and use—Towns Improvement Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 34), *ss.* 126–129.] By a local Act passed in 1862, the corporation of Brecon were empowered to carry out certain public works, including a cattle market and slaughter-house. The corporation not having erected either a cattle market or a slaughter-house, and having become largely indebted, a second local Act (incorporating the Markets and Fairs Clauses Act, 1847) was passed, by which their creditors were incorporated as the Brecon Markets Company, with powers, by s. 64, to erect a cattle market, and, by s. 65, "with, but not without, the consent of the corporation testified by writing under the hand of the mayor or town clerk, to provide and maintain slaughter-houses . . . upon such sites as they may think expedient." The corporation was at that time, by virtue of the Public Health Act, 1848, s. 12 (adopted in 1850), and the Local Government Act, 1858, ss. 5 and 24, the local board; and by s. 45 of the latter Act the provisions of the Towns Improvement Clauses Act, 1847, with respect to slaughter-houses, were incorporated, the local board being, by s. 7, substituted for the commissioners. By the Towns Improvement Clauses Act, 1847, s. 126, no place (not already so used) is to be used as a slaughter-house, unless "a licence for the erection thereof, or for the use and occupation thereof as a slaughter-house" has been obtained from the commissioners. By s. 128, the commissioners are to make bye-laws for the regulation of slaughter-houses, and by s. 129, on the conviction of any person for the violation of these bye-laws, the convicting justices may revoke the licence granted under that or the special Act, and the commissioners may refuse to grant a fresh licence to such person. The Brecon Markets Company applied for and obtained from the corporation, under s. 65 of the second local Act, their consent in writing to erect a slaughter-house; and having erected it, they let the tolls to the plaintiff. The plaintiff being prevented by the inspector of nuisances from slaughtering at the slaughter-house, on the ground that no licence for its erection and use had been granted by the local board under the Towns Improvement Clauses Act, 1847, s. 126, the plaintiff brought an action against the Brecon Markets Company for want of title to let the tolls:—*Held* (reversing the decision of the Court below), first, that the consent given under s. 65 of the local Act was not merely given by the corporation in respect of their proprietary interests, but was given by them as the local board; secondly, that the licence to erect included a licence to use when erected.—*Quære*, whether the defendants were subject to the control of the local board under ss. 128, 129 of the Towns Improvement Clauses Act, 1847? Anthony *v.* The Brecon Markets Company - - - - - **Ex. Ch. 399**

SPARS USED FOR FUEL - - - 39
See General Average.

SPECIFIC CHATTEL—Breach of warranty—Return of goods - - - - - 7
See Warranty of Sale.

STAMPS—*Stamp Act,* 1870 (33 & 34 *Vict. c.* 97)—*Conveyance on Sale—Covenant to secure periodical Payments—Double Duty.*] By an indenture between a company and a licensee, in consideration of 7500*l.*, of which 1500*l.* was then paid, and the remainder was to be paid in monthly instalments of 1000*l.*, the company granted to the licensee "the sole and exclusive right, licence, and authority to carry on with the asphalte of or to be supplied by the company, but not with any other asphalte, the business of asphalte paving, and of therein and otherwise using, vending, and dealing in asphalte, and of an asphalte company or asphalte business generally, within the counties of Lancaster and Chester," during the continuance of the company's concessions. The company covenanted to supply the licensee with asphalte, but were not to be bound to prevent the use or sale of asphalte within the said counties by any other person, excepting only the use or sale of such asphalte as was agreed to be supplied under the contract, either by the company or by persons purchasing from the company; and the licensee agreed not during the continuance of the licence to use, sell, or deal within the said counties in any other asphalte than that to be supplied by the company.—The licensee covenanted to pay the remaining 6000*l.* by six monthly instalments of 1000*l.*, and if he should assign the licence, to pay the whole of the remaining instalments on the expiration of two months from the date of the assignment:—*Held*, 1st, that the deed was not chargeable as a conveyance on sale, no property being in fact conveyed by it; 2nd, that if it had been so chargeable, one duty only could have been charged in respect of the 7500*l.*, and not a second duty in respect of the covenant to pay by instalments the 6000*l.* remaining unpaid; 3rd, that such a payment by instalments is a periodical payment within the meaning of the Stamp Act, 1870, s. 72. LIMMER ASPHALTE PAVING COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE [211

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29 Car. 2, c. 3. s. 17 - - 1, Ex. Ch. 279
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36 Geo. 3, c. 52, s. 19 - - - 140
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3 & 4 Wm. 4, c. 27, ss. 2, 21 - - 145
See INALIENABLE ESTATE TAIL.

1 & 2 Vict. c. 110, ss. 14, 15 - - 332
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7 Vict. c. 15, s. 21 - - - 130
See EVIDENCE OF NEGLIGENCE.

10 & 11 Vict. c. 34, ss. 126, 129 Ex. Ch. 399
See SLAUGHTER-HOUSE.

—— c. 89, ss. 3, 38 - - - 369
See HACKNEY CARRIAGE.

11 & 12 Vict. c. 63, s. 2 - - - 369
See HACKNEY CARRIAGE.

15 & 16 Vict. c. 76, s. 37 - - 143
See AMENDMENT IN COUNTY COURT.

19 & 20 Vict. c. 108, s. 26 - - 143
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—— c. 108, ss. 50, 51 - - - 55
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21 & 22 Vict. c. 106 - - - 365
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23 & 24 Vict. c. 127, s. 2 - - 202
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24 Vict. c. 10, s. 13 - 187, Ex. Ch. 287
See ADMIRALTY COURT JURISDICTION.

28 & 29 Vict. c. 86 - - - 218
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30 & 31 Vict. c. 142, s. 5 - - 21
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32 & 33 Vict. c. 71, s. 23 - - 242
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—— c. 71, ss. 39, 81 - - Ex. Ch. 263
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SUBSIDENCE—Surface—Mines - - 379
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SUIT FOR LIMITATION OF LIABILITY 187, [Ex. Ch. 287
See ADMIRALTY COURT JURISDICTION.

SUPPORT—*Mines—Injury to Surface—Subsidence.*] In 1840 a bed of coal, called the High Hazle Bed, was demised, with working powers, to persons from whom the defendants took by assignment. The lessees were to pay a minimum rent of 200*l.* as for 2*a.* 1*r.* 16*p.*, and a further yearly rent at the rate of 85*l.* per acre for coal actually got beyond the 2*a.* 1*r.* 16*p.*, "including all ribs and pillars left in working the said coal, *except* the pillars for the support of the shafts, the pillars between the deep and counter level, the pillars all round the estate, and the pillars under the homestead and farm buildings." These pillars, of specified dimensions, the lessees bound themselves to leave "during the whole of the term," and they also covenanted to work the mines "according to the best of their judgment, skill, and discretion, in a good and workmanlike manner."—In 1857 the assignee of the lessor conveyed part of the land within which the mine lay to persons from whom the plaintiffs took with notice, reserving to the grantor the High Hazle Bed (except a small portion specified), and the "mines, veins, and bed of coal, fire-clay, and other clay, stone and other minerals lying under the said bed called the High Hazle Bed," with powers to the grantor, his heirs and assigns, and his and their tenants and lessees, to be exercised "from and after the expiration of the term" for "carrying on the works of the mine, and getting and carrying away the said fire-clay, &c.," so reserved; and also reserving to the grantor the coal rent under the lease of 1840, with the necessary powers. Provision was made for rent for land used or occupied by the grantor for the purposes of the mine, and for compensation for buildings required or removed for that purpose, and for surface damage to the land; but it was specially provided that the grantor, his heirs or assigns, tenants or lessees, should not be liable for any damage

SUPPORT—*continued.*
caused to buildings which should thereafter be erected on the land conveyed, by the sinking of the land through mining operations in getting the "coal, clay, stone and other minerals hereby excepted and removed."—The pillars specified in the lease of 1840 were left: and the defendants worked according to the usual course of mining in the district; but their workings caused a subsidence, which injured the land of the plaintiffs and buildings erected since 1857. The land would have subsided without the buildings.—*Held* (by Martin and Cleasby, BB.; Bramwell, B., doubting), that, it appearing by the lease of 1840 to be the intention of the parties that all the coal should be removed, except the specified pillars, and the defendants having worked the mine in a proper manner, they were not liable for the injury.—By Bramwell, B., that so far as concerned the houses, the proviso in the conveyance of 1857 protected the defendants from liability, notwithstanding that the lease under which they held was antecedent to that deed.—*Dugdale* v. *Robertson* (3 K. E. J. 695), and *Taylor* v. *Shafto* (8 B. & S. 228), commented on. Eadon *v.* Jeffock - 379

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See Forbearance from legal Proceedings.

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TRESPASS—Collecting water - - 305
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See Legacy Duty.

USE AND OCCUPATION - - - 88
See Assignment of Lease. 1.

VENDOR AND PURCHASER—Title—Voluntary conveyance - - - 313
See Voluntary Conveyance.

VOLUNTARY CONVEYANCE—*Vendor and Purchaser—Title—27 Eliz. c.* 4.] The defendant having executed a voluntary conveyance, agreed to sell the property comprised in it to the plaintiff, who paid a deposit. The plaintiff refused to accept the title, and sued for the deposit:—*Held*, that the defendant could not make a good title, first, because the voluntary conveyance might have since been confirmed by a consideration, and its invalidity therefore depended on a doubtful state of facts; and secondly, because the defendant could not compel the plaintiff to concur in defeating the previous conveyance, and making a good title to himself; and that the plaintiff was therefore entitled to recover the deposit. Clarke *v.* Willott - - - - 313

WARRANTY ON SALE—*Vendor and Purchaser——Sale of Specific Chattel—Right of Return—Injury to Chattel whilst in Purchaser's Possession—Warranty—Knowledge of Breach of Warranty.*] The plaintiff, on Monday, the 13th of March, 1871, bought a horse of the defendant, warranted to have been hunted with the Bicester hounds. By a condition of the contract he was to be at liberty to return the horse if it did not answer its description up to the Wednesday evening following the sale. Previous to removing it from the defendant's premises he was told by the groom who had charge of it, but who was not in the defendant's employment, that it had not, nor had it, in fact, been hunted with the Bicester hounds. The plaintiff, nevertheless, took the horse away. Whilst it was in his possession, though not through any neglect or default on his part, it met with an accident which depreciated its value. He returned it before the Wednesday evening, and brought an action to recover the price he had paid for it:—*Held*, first, that the plaintiff's conduct in removing the horse after the information given him by the groom did not deprive him of his right under the contract to return the horse; and secondly, that his right to return it was unaffected by an accident having happened to it whilst in his possession, without neglect or default on his part. Head *v.* Tattersall - - 7

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LONDON: PRINTED BY WILLIAM CLOWES AND SONS, STAMFORD STREET
AND CHARING CROSS.

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